Supreme Court, U.S.
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No.

In the Supreme Court of the United States

WASHINGTON MUTUAL BANK, FA,
SUCCESSOR TO GREAT WESTERN BANK

Petitioner,

v.

GEORGE DAWSON AND BARBARA J. DAWSON

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM G. MALCOLM
Counsel of Record
ARTURO M. CISNEROS
KEVIN HAHN
MALCOLM CISNEROS
2112 Business Center Drive
Second Floor
Irvine, CA 92612
949-252-9400
Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED

1. Is an individual who is injured by a willful violation of the automatic stay entitled to recover damages for emotional distress as a component of "actual damages" under 11 U.S.C. § 362(h)?

LIST OF PARTIES

Defendant/Appellee in the Courts below is the Petitioner herein: Washington Mutual Bank, a corporation.

Plaintiffs/Appellants in the Courts below were: George and Barbara Dawson, individuals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Bankruptcy Court for the Northern District of California was affirmed in pertinent part by the United States District Court for the Northern District of California. Neither opinion was published. With the approval of the Clerk of the Supreme Court, the Petitioner has included herein only an excerpt from the Bankruptcy Court's opinion as Appendix "B." The opinion of the District Court is included herein as Appendix "C." The initial opinion of the Ninth Circuit Court of Appeals is reported at *In re Dawson*, 367 F.3d 1174 (9th Cir. 2004). The opinion was withdrawn on October 4, 2004. A new opinion was issued on December 10, 2004, 390 F.3d 1139 (9th Cir. 2004). The Ninth Circuit Court of Appeals reversed the decision of the District Court as to the pertinent issue in question and remanded for further proceedings. See Appendices "A-F."

JURISDICTION

The Ninth Circuit issued its decision on December 20, 2004, and denied the Apellee's petition for rehearing and rehearing *en banc* on February 28, 2005 despite the filing by the United States of its *amicus curiae* brief in support of the Petition for Rehearing and Rehearing *en banc*. This Court has jurisdiction to review this pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 11 United States Code, Section 362(h).

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages.

[This code section will be re-numbered 11 U.S.C. Section 362(k)(1) effective October 17, 2005, pursuant to new legislation passed under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The substance of the code section will not change.]

STATEMENT OF THE CASE

A. Facts and Proceedings in the Courts Below

Plaintiffs George and Barbara Dawson brought an adversary complaint under the present Chapter 13 case claiming emotional distress damages based on two alleged willful violations of the automatic stay committed by the Defendant more than two years earlier during George Dawson's prior Chapter 7 case. The first alleged violation involved a foreclosure sale to enforce the Defendant's first mortgage on real property in which the Plaintiffs were residing. The sale occurred on February 8, 1996, before the Defendant had notice of the George Dawson's Chapter 7 bankruptcy petition. George Dawson had filed for Chapter 7 relief only two days earlier. The second alleged violation involved an unlawful detainer action instituted by the Defendant after it had completed its foreclosure sale. The Defendant's unlawful detainer lawyer received notice of the bankruptcy filing on the same day that he filed the action. The Defendant dismissed the action voluntarily about two weeks later on March 14, 1996.

The bankruptcy court found that the Plaintiffs did not have an equitable interest in the property because the property had previously been foreclosed upon by a junior mortgagee and transferred to another party. Thus, the court held that the foreclosure sale was not a violation of the automatic stay. However, since the Plaintiffs still had a possessory interest, the institution of the unlawful detainer action was held to be a violation of § 362(a)(3). Although this violation was "willful" (meaning only that the act was performed with knowledge that the stay was in effect) under *Goichman v. Bloom* (*In re Bloom*), 875 F.2d 224, 227 (9th Cir. 1989), the bankruptcy court found that it was not "egregious" and further found that there was no corroborating evidence of emotional distress. For those reasons, the court declined to award emotional distress damages.

On appeal, the district court affirmed the ruling but reversed only as to the bankruptcy court's finding that the estate did not have an equitable interest in the property at the time of the foreclosure sale and remanded for further proceedings in that regard. Plaintiffs appealed to the Ninth Circuit Court of Appeals on the issue of whether emotional distress damages are allowable as a component of "actual damages" under § 362(h).

B. The Ninth Circuit's Initial Decision

Initially, in an opinion dated March 18, 2004 (367 F.3d 1174), the Ninth Circuit affirmed the decision. In its initial decision, the Ninth Circuit concurred with the holding of the Seventh Circuit in *Aiello v. Providian Financial Corp.*, 239 F.3d 876 (7th Cir. 2001) by recognizing that the Seventh Circuit simply held that emotional distress damages are not available under § 362(h). (Id. at 1180-81):

> We are persuaded by the Seventh Circuit's approach. The interests served by § 362(h) are economic. To be sure, intentional infliction of severe emotional distress sometimes can occur when a creditor willfully violates an automatic bankruptcy stay. State laws, however, provide tort remedies for intentional infliction of severe emotional distress, and § 362(h) does not duplicate those tort remedies. We hold that "actual damages" under § 362(h) do not include damages for emotional distress.

C. The Ninth Circuit's December 10, 2004 Decision

Appellants petitioned for rehearing and rehearing *en banc*. On December 10, 2004, the Ninth Circuit denied the Petition as moot, having withdrawn its earlier decision. The Ninth Circuit issued a new decision in which it held that Congress meant "actual damages" to include compensation for emotional distress. (390 F.3d 1139). Appellee petitioned for rehearing and rehearing *en banc* on January 4, 2005. On February 28, 2005, the Ninth Circuit denied the Petition for Rehearing and Rehearing *En Banc* despite the filing by the United States of its *amicus curiae* brief in support of the Petition for Rehearing and Rehearing *En Banc*.

REASONS FOR GRANTING THE WRIT

A determination of whether 11 U.S.C. § 362(h) authorizes recovery of emotional distress damages is an important question on which this Court's guidance is urgently warranted. While the Ninth Circuit got it right the first time, it went astray in its second opinion. The Ninth Circuit's decision

has created a conflict and split among the Circuit Courts. Furthermore, the Ninth Circuit failed to heed this Court's admonition that the Bankruptcy Code should not be construed to change pre-Code bankruptcy law absent manifest Congressional intent (which does not exist for 11 U.S.C. § 362(h)). Finally, the Ninth Circuit disregarded this Court's instruction to find Congress' meaning in the generally shared common law when common-law terms are used without congressional history.

The Ninth Circuit's decision stands in direct conflict with the rule established by the Seventh Circuit in the *Aiello* decision on the issue of allowability of emotional distress damages under 11 U.S.C. § 362(h). On the one hand, *Aiello* holds that emotional distress damages are not "actual damages" under § 362(h). On the other hand, *Dawson* creates a new standard for the issuance of damages not consistent with the Bankruptcy Code. The Ninth Circuit appears to be the first to attempt to analyze the legislative history, perhaps because there is no legislative history discussing 11 U.S.C. § 362(h). As demonstrated below, the Ninth Circuit misapplied 1978 legislative history to construe a 1984 enactment (the addition of subsection (h) to § 362). In addition, the Ninth Circuit misunderstood 1978 legislative history.

In resolving an acknowledged "ambiguity" in the phrase "actual damages," the Ninth Circuit also overlooked the Supreme Court's admonition that the Bankruptcy Code should not be read to change pre-Code bankruptcy law absent manifest congressional intent. It constructed a standard for allowing emotional distress damages that is far more liberal than the standard applicable to any remotely analogous tort, without the slightest indication of legislative intent to create such an anomalous action - mandating monetary damages where emotional distress is the sole injury (unless it is insignificant),

and regardless of the culpability of the defendant. Congress should not lightly be taken to have enacted bankruptcy legislation that departs so widely from well-established common law. Also, in this regard the Ninth Circuit overlooked the established practice of looking to generally shared common law when common-law terms are used in statutes without further specification.

The Ninth Circuit's ruling which creates a conflict among the Circuits and its disregard for the standards and practices mandated by the Supreme Court are matters of exceptional national importance that need resolution in order to avoid inconsistent application of one of the most fundamental provisions of the Bankruptcy Code.

I. THE DECISION HAS CREATED UNCERTAINTY AMONG THE CIRCUITS AS TO THIS MATTER OF EXCEPTIONAL IMPORTANCE.

A. The Decision Directly Conflicts With The Seventh Circuit Decision in *Aiello*, Creating A Need For National Uniformity.

The Ninth Circuit's decision conflicts squarely with the Seventh Circuit's decision in *Aiello.* The Ninth Circuit misunderstood the Seventh Circuit decision stating that the Seventh Circuit requires "an individual suffer a *financial* loss in order to claim emotional distress damages" under § 362(h). In fact, *Aiello* held that § 362(h) does not extend to claims for emotional distress damages under any circumstances. Instead, it held that a *state tort law* claim for emotional distress damages may be "piggybacked," under the "clean-up doctrine," on a financial injury claim under § 362(h). The Seventh Circuit properly understood § 362(h) to allow for compensation

of financial losses and "not to redress tort violations."1

Courts within the Seventh Circuit have correctly understood *Aiello* to exclude emotional distress damages entirely from § 362(h). *E.g., In re Welch*, 296 B.R. 170, 172 (Bankr. C.D. Ill. 2003); *In re Rice*, 2001 WL 34072900 (Bankr. C.D.Ill. 2001). However, the Ninth Circuit decision has created an interpretation of the Code section that opposes the sound analysis expounded by the Seventh Circuit. Courts have been left with the uncertainty of choosing between two approaches that are in direct conflict with each other. *See In re Rijos*, 263 B.R. 382, 390 (1st Cir. BAP 2001). Lower courts like the B.A.P. of the Eighth Circuit have already begun to adopt the Ninth Circuit's erroneous view. *In re L'Heureux*, 322 B.R. 407, 411 (8th Cir. BAP 2005). Review of this case would allow this Court to address this issue directly and establish national uniformity on an important issue that requires resolution.

B. The Ninth Circuit Ignored Common Law And Improperly Applied Legislative History To Ascertain Congressional Intent.

The primary task of the Ninth Circuit was to ascertain the meaning of "actual damages" in § 362(h). Observing that the statute contains no definition, the Ninth Circuit found what it called a "contextual clue" in the term "individual" which is used in the statute to describe those eligible for damages. The

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1 The First Circuit was the first to address this issue, albeit tangentially, in *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269-70 (1st Cir.1999). It held that emotional distress damages are available with no special limitations. However, *Aiello* refused to follow *Fleet Mortgage*, noting that the issue of whether the statute authorizes an award of emotional distress damages was not addressed in *Fleet Mortgage* but merely resolved by presumption, without contest, the creditor having waived it, as *Aiello* observes. 239 F.3d at 878

Ninth Circuit observed that both individual creditors as well as individual debtors are eligible. The Ninth Circuit made the assumption that by limiting the availability of damages to individuals, "Congress signaled its special interest in redressing harms that are unique to human beings," and observed that "[o]ne such harm is emotional distress, which can be suffered by individuals but not by organizations." 390 F.3d at 1146.

The Ninth Circuit acknowledged that even after examining the text and context of § 362(h), the meaning of "actual damages" remained "ambiguous," making recourse to legislative history appropriate.2 However, the Ninth Circuit misunderstood the import of § 362(h)'s limitation to individuals and misapplied the legislative history to ascertain a meaning of "actual damages" that is nowhere stated by any member of Congress. The automatic stay, having evolved first by orders and then as a rule,3 was made statutory as part of the massive Bankruptcy Reform Act of 1978. Pub.L.No. 95-598, § 362, 92 Stat. 2570 (1978). It contained no damages remedy and was enforced in the traditional manner, through 11 U.S.C. § 105, the statutory version of the bankruptcy contempt power. By

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2 In a footnote, the Ninth Circuit observed that the Ninth Circuit's decisions have reached divergent decisions on the meaning of "actual damages" in various federal statutes. 390 F.3d at 1146. Defendant submits that the explanation lies in recognizing that cognizable injuries in statutes protecting property or financial interests (Securities Act, Copyright Act) are limited to economic losses, while statutory torts that are fundamentally dignitory in nature (invidious discrimination, unfair credit reporting, etc.) must allow for a broader meaning redressing reputational harm and emotional distress because such injuries are the fundamental and direct concern of the statutes. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978).

3 Under the old Bankruptcy Act of 1898, the stay was imposed first by court order at the debtor's request, and later by general orders and finally by court rule. See generally *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104-05 (2d Cir. 1990); *Collier on Bankruptcy*, § 362.LH (15th ed.) (giving a historical analysis of the automatic stay).

1984, the contempt power of the Article I bankruptcy judges was a source of dispute. Although bankruptcy judges could plainly issue injunctions and effectively unwind transactions that violated the stay, it was unclear whether they had power to order civil contempt sanctions, including attorney fees.4 Against this background of uncertainty, the Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), placed limits on the power of Article I bankruptcy judges. Congress enacted § 362(h) as part of legislation responding to *Northern Pipeline*. The Sixth Circuit has observed that subsection (h) was added "because reliance on the contempt power to remedy violations of § 362 had been widely criticized." *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000) (citing *Peterson v. Wells Fargo Bank,* 2000 WL 1225788 (E.D.Cal. Aug.17, 2000) (identifying particular criticisms)).

Thus, § 362(h) was enacted to make "actual damages" mandatory in redressing injury to an "individual." Congress added a damages remedy to ensure that bankruptcy judges had power to award damages for violations of the automatic stay, and limited this remedy to individuals because it felt that the remedies under § 105 - injunctions and orders to return seized funds or other property (and attorney fees where a violation is contumacious, assuming bankruptcy judges had contempt power) - were sufficient for corporate debtors.

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4 See Advisory Committee Note to 1987 amendment to Fed.R.Bankr.P. 9020. See generally Robert E. Ginsberg, *Recent Developments In Jurisdiction And Contempt Powers Of The Bankruptcy Court*, 449 PLI/Comm 323 (1988) (collecting cases). The Ninth Circuit once held that bankruptcy judges had no civil contempt power. *In re Sequoia Auto Brokers Ltd.*, 827 F.2d 1281 (9th Cir. 1987). It subsequently held in *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996), that *Sequoia* was superseded by the 1987 adoption of Bankruptcy Rule 9020 (which was later amended in 2001 to remove limitations).

The Ninth Circuit has openly embraced this interpretation of the use of the word "individual." In construing "individual" in § 362(h) not to include corporations in *In re Goodman*, 991 F.2d 613, 619-20 (9th Cir. 1993), the Ninth Circuit expressly praised the analysis in *In re Chateaugay*, 920 F.2d 183 (2d Cir. 1990), in which the Second Circuit observed that § 362(h) was added out of concern that consumer debtors, who are invariably individuals, often are not aware of their rights and may have the need for special protection in the form of an explicit and mandatory damages provision triggered even by good faith willful conduct, unlike under the law of contempt, where good faith was highly relevant. *Id.* at 185-87. *See also In re Pace*, 67 F.3d 187, 193 (9th Cir. 1995) (while an award of damages under § 362(h) is mandatory, an award of damages for contempt is discretionary). This explanation, previously endorsed by the Ninth Circuit in *Goodman*, more likely explains the limitation to "individuals" than the notion that Congress was attempting to protect their feelings.

Nevertheless, the Ninth Circuit turned to legislative history to support its new interpretation. Finding no legislative history to the addition of § 362(h) in 1984, the Ninth Circuit turned to the legislative history of the 1978 codification of the automatic stay to construe the 1984 enactment of the damages remedy for individuals. *See Price v. Rochford*, 947 F.2d 829, 831 (7th Cir. 1991) (observing the lack of legislative history and stating that "Congress did not . . . clarify what kinds of 'actual damages' may be recovered"). It is almost entirely on the basis of this inapplicable legislative history that the Ninth Circuit made its decision.

The Ninth Circuit quoted from the section by section discussion in the House Report No. 95-595 (1977), in which

the to-be-codified automatic stay was said to give the debtor "a breathing spell from his creditors" and was described as "stop[ping] all collection efforts, all harassment, and all foreclosure actions," and enabling a debtor to attempt reorganization "or simply to be relieved of the financial pressures that drove him into bankruptcy." (390 F.3d at 1147-48, quoting H.R.Rep. 95-595 at 340). The Ninth Circuit then inaccurately said that the Report "went on to say":

> . . . . Frequently, a consumer debtor is severely harassed by his creditors when he falls behind in payments on loans. The harassment takes the form of abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor's reputation and so on.

(*Ibid.*, quoting H.R.Rep. 95-595 at 125-26). In fact, the passage is from an earlier chapter of the House Report (chapter 3) devoted to "Consumer Debtors."5 The Ninth Circuit next observed that a "footnote" to this passage references "an Appendix in which a lawyer for the Federal Trade Commission further detailed abuses to which consumer debtors are frequently subjected." (*Id.* at 1148). The Ninth Circuit quoted passages from the Appendix describing communications directed at a debtor's family, friends, neighbors, and employer, suggesting that an individual in bankruptcy is in "desperate trouble," and urging that relief should be provided "with due regard for the dignity of the consumer as an individual who is in need of help." (*Ibid.*, quoting Appendix I to Chapter 3 of H.R.Rep. No. 95-595).

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5 The concern for attacks on the debtor's reputation appears to refer to the debtor's *credit* reputation – a pecuniary interest. *See* H.R.Rep. 95-595 at 118 (1978 U.S.C.C.A.N. at 6079).

The 1978 legislative history to its codification gives no indication that Congress was concerned with mental anguish for its own sake, as opposed to what it may lead to - payment in violation of the stay. As noted, the stay had long operated (as a general order and then a rule) to prevent all collection efforts, including harassment. Harassment is a debt collection strategy, and the consequence often includes successful collection, thus violating the pecuniary interests of the debtor and also possibly the rights of other creditors with equal or higher priority claims against a debtor's limited bankruptcy estate. Accordingly, preventing harassment serves the financial purposes of the bankruptcy laws because it serves to prevent collection of pre-petition assets outside the Code's priority scheme and to prevent collection from after-acquired assets when the claim may be determined to be dischargeable and thus should not be collected at all.

Identical passages in the House and Senate reports from 1978 confirm this explicitly by immediately following the very language the Ninth Circuit quoted from the House Report's specific discussion of proposed § 362 with an explanation that such debt collection tactics may prompt repayment in violation of the stay, and that § 362(a)(6)'s prohibition of "acts to collect" was designed to prevent such evasion of its purpose by creditors:

> Creditors in consumer cases occasionally telephone debtors to encourage repayment in spite of bankruptcy. Inexperienced, frightened, or ill-counseled debtors may succumb to suggestions to repay notwithstanding their bankruptcy. This provision prevents evasion of the purpose of the bankruptcy laws by sophisticated creditors.

H.R.Rep. 95-595 at 342 (1978 U.S.C.C.A.N. at 6298); S. Rep. 95-989 at 50-51 (1978 U.S.C.C.A.N. at 5836-37). Perhaps more probatively since it is § 362(a)(3) that defendant has been held to have violated, the same passage of the reports state that "[t]he purpose of this provision is to prevent dismemberment of the estate." H.R. Rep 95-595 at 341; S. Rep. 95-989 at 50.

But just because Congress, in codifying the stay of all acts to collect prepetition debts in 1978, recognized that this would include stopping "harassment," does not mean that Congress six years later in 1984 necessarily provided for mandatory monetary compensation for emotional distress (or for "significant" emotional distress) for every kind of stay violation, without regard to whether any harassment was involved. In this regard, it appears that Congress simultaneously conferred discretion to award punitive damages and presumably considered this a more appropriate remedy for deliberate "harassment," such as "abusive telephone calls at all hours." To the extent deterring or redressing "harassment" was a purpose behind subsection (h), the threat of punitive damages, placed in the discretion of the court, would presumably be sufficient, rather than mandating compensation for emotional distress in every case - whether the violation is accompanied by harassment or not.

It was also inappropriate for the Ninth Circuit to rely so heavily on a footnote generally cross-referencing the entire submitted statement of a staff lawyer from the FTC, submitted as his personal views and explicitly not those of the Commission. The entire statement, including the suggestion that relief "should be provided . . . with due regard for the dignity of the consumer as an individual who is in need of help," had nothing to do with the stay. Rather, it was in support of the FTC staff lawyer's personal urging to adopt a provision invalidating all

reaffirmation agreements (*see* H.R.Rep. 95-595 at 173) - a proposal that Congress squarely rejected. Moreover, not all bankruptcies and not even all Chapter 13 cases involve consumer debt. Often they involve mortgages, as here, and/or taxes and small business indebtedness. While several Code provisions focus specifically on consumer debt, the stay applies to all debts and all creditors equally.

II. THE DECISION IGNORES THE SUPREME COURT'S ADMONITION THAT THE CODE SHOULD NOT BE READ TO ALTER PRE-CODE LAW ABSENT MANIFEST CONGRESSIONAL INTENT.

The Supreme Court has warned against "arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). Both pre-Code bankruptcy practice and practice under § 362 before 1984, however, show that allowing emotional distress damages for stay violations would represent a marked departure from prior law.

As noted, under pre-Code law, the stay, as an order, a general order, and then a rule, was enforced using contempt power. Emotional distress damages traditionally are not available in an action for contempt. *See, e.g., McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992) ("[t]he problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings"); *In re Walters*, 868 F.2d 665, 670 (4th Cir.1989); *Weitzman v. Stein*, 891 F.Supp. 927, 932 (S.D.N.Y. 1995) (same). Indeed, we have been unable to find a contempt case awarding emotional distress damages before the

enactment of Section 362(h) in 1984.

After 1978, the codified stay was also enforced by reliance on 11 U.S.C. § 105. There are no pre-1984 cases awarding emotional distress damages under that statute as far as we are able to discern. Moreover, § 105 is not materially different from § 2a (15) of the old Bankruptcy Act of 1898. 11 U.S.C. § 11a (15) (repealed in 1978).

Under *Dewsnup*, therefore, § 362(h) should not be deemed to embrace emotional distress damages absent some explicit indication in the statute or its legislative history. Here the Ninth Circuit admitted that the phrase "actual damages" is ambiguous (even in the context of its limitation to "individuals"). As noted, the 1984 addition of § 362(h) has no discernable legislative history. Nor is there any explicit mention in all of the 1978 legislative history relating to emotional distress. Nevertheless, the Ninth Circuit ignored common law and wrote in a meaning for "actual damages" to include emotional distress damages that finds no support in the legislative history.

III. THE DECISION CONFLICTS WITH THE SUPREME COURT'S ESTABLISHED PRACTICE OF REVIEWING GENERALLY SHARED COMMON LAW.

This Court has said that it has an "established practice of finding Congress' meaning in the generally shared common law when common-law terms are used without further specification . . . ." *Field v. Mans*, 516 U.S. 59, 73-74 (1995).

If the Ninth Circuit had applied the standard referenced above, it would have found that emotional distress damages under common law are subjected to a much more stringent standard than the one articulated in the revised opinion.

The generally shared common law regarding emotional distress that is most analogous to violations of the stay are those involving property, such as conversion and trover, and those addressing wrongful debt collection in particular. In most states, emotional distress damages have historically been unavailable unless there is physical injury or intent to inflict the distress, with certain immaterial exceptions. *See Recovery for Mental Shock or Distress in Connection with Injury to or Interference With Tangible Property*, 28 A.L.R.2d 1070 (1953, and subsequent supplements); *Joel E. Smith, Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, For Damages Resulting From Debt Collection Methods*, 87 A.L.R.3d 201 (1978 and supplements). *See also Restatement, Torts 2d*, § 46.

Consistent with this Court's practice of looking to shared common law to interpret statutes appearing to adopt common law remedies, assuming emotional distress damages are available at all under § 362(h), they should be limited to cases of egregious and deliberate creditor misconduct - *i.e.*, the kinds of "harassment" mentioned by the Ninth Circuit - and only where the stress caused is severe rather than merely "significant."

The standard adopted by the Ninth Circuit will filter out few claims and leaves creditors exposed to expensive litigation in fighting claims to recover for temporary emotional distress resulting from innocent errors. Only if stress is "insignificant" will a creditor prevail. Such exposure creates an anomalous cause of action for emotional distress associated with wrongful debt collection that is unheard of under common law, thus violating this Court's "established practice of finding Congress's meaning in the generally shared common law" when it construes the Bankruptcy Code. *Field v. Mans* at 73-

74. *See also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 537 (1999) ("We assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief").

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

MALCOLM ♦ CISNEROS,
A Law Corporation,

William G. Malcolm
Counsel of Record
MALCOLM ♦ CISNEROS
A Law Corporation
2112 Business Center Drive
Second Floor
Irvine, CA 92612
(949) 252-9400

APPENDIX A

Title 11 United States Code, Section 362(h).

(h) "An individual injured by any willful violation of a stay provided by this section shall recover damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages."

APPENDIX B

IN THE UNITED BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re

Case No. 98-45213 TG
Chapter 13

GEORGE E. DAWSON and
BARBARA J. DAWSON,

Debtors.

_____/

GEORGE E. DAWSON and
BARBARA J. DAWSON,

A.P. No. 98-4796 AT

Plaintiffs,

vs.

WASHINGTON MUTUAL BANK,
F.A., etc.,

Defendant.

_____/

MEMORANDUM OF DECISION

In a prior Memorandum of Decision (the "Memorandum"), filed on October 11, 2000, the Court determined that, during the period from February 20, 1996 through March 14, 1996, the defendant Washington Mutual Bank, F.A. (the "Bank) willfully violated the automatic stay in

the chapter 7 bankruptcy case of the above-captioned debtor George E. Dawson ("Mr. Dawson"). The Court concluded that Mr. Dawson was entitled to recover his actual damages incurred as a result of the violation pursuant to 11 U.S.C. § 362 (h). The Court solicited and received evidence and argument from the parties concerning these damages. Having considered the submissions, for the reasons stated below, the Court now finds and concludes that Mr. Dawson is entitled to an award of damages against the Bank in the amount of $2,307.60. For the reasons stated below, the Court will order the Bank to pay this amount to Mr. Dawson and will not permit the Bank merely to reduce by the amount of the award the balance due on the loan (the "Loan") secured by the real property (the "Real Property") previously owned by Mr. Dawson.

[Extraneous Text Omitted]

Emotional Distress Damages. As noted above, Mr. Dawson contended that emotional distress damages are recoverable under 11 U.S.C. § 362(h), citing *In re Fisher*, 144 B.R. 237 (Bank.. D. R.I. 1992). The Bank did not dispute this contention. However, it objected that the monetary amount that Mr. Dawson requested in compensation for his emotional distress--$20,000--was arbitrary and unsupported by expert testimony. The Bank contended that it was impossible to separate the emotional distress Mr. Dawson suffered as a result of its brief stay violation from the emotional distress Mr. Dawson was suffering as a result of his more general financial problems.

In *Fisher*, within a few days after the debtor filed a chapter 7 bankruptcy petition, a Mr. Clemente ("Clemente"), who had been hired by the creditor with a lien on her car, called the debtor and advised her that she would be committing a "criminal felony" if she failed to surrender the car to him. The debtor, understandably upset, contacted her bankruptcy attorney who called Clemente and advised him about the bankruptcy filing. Clemente stated that he did not care about the bankruptcy. Thereafter, Clemente proceeded to repossess

the car despite being admonished by the debtor's bankruptcy counsel and even the chapter 7 trustee that he was violating the law.

As a sanction for this conduct, the *Fisher* court awarded compensatory damages of $1,000 to the debtor for her embarrassment and emotional distress. There was no discussion in the opinion of whether an award for emotional distress was proper under 11 U.S.C. § 362(h); the Court appears to have assumed that it was.

In its reply brief and at the hearing on this motion, the Bank cited a recent district court case that contained a more helpful analysis of the issue: i.e., *Aiello v. Providian Financial Corp.*, 257 B.R. 248 (N.D. Ill. 2000), *affirmed* 239 F.3d 876 (7th Cir. 2001). In *Aiello*, a creditor had threatened to charge a chapter 7 debtor with fraud if she refused to reaffirm its debt. The debtor did refuse, and the creditor did not bring a fraud action against the debtor. Nevertheless, the debtor filed a class action suit for damages against the credit card creditor. The bankruptcy court granted summary judgment in favor of the defendant.

The bankruptcy court found that the debtor's evidence of emotional distress damages was insufficient. The evidence consisted of her sworn statement that, when she received "the threatening letters from the defendant, she 'cried, felt nauseous and scared and the letter caused her to quarrel with her husband....'" 239 F.3d at 878. The district court affirmed.

The district court summarized the holdings of a series of bankruptcy court cases and one Ninth Circuit bankruptcy appellate panel case dealing with the issue.1 It noted that, with

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1 The Ninth Circuit Bankruptcy Appellate Panel case cited in *Aiello* was *In re McHenry*, 179 B.R. 165, 166 (1995). In *McHenry*, a debtor sought emotion distress damages based on his declaration that the creditor's conduct had upset the debtor's wife who was ill and had "aggravated her illness." The bankruptcy court denied the request, and the Bankruptcy Appellate Panel affirmed. 179 B.R. at 166. *McHenry* does not hold that emotional distress damages are never recoverable nor does it establish a

one exception, emotional distress damages had only been awarded when the violation was egregious.2 257 B.R. at 249-250. The district court cited with approval the bankruptcy court's conclusion that emotional distress damages should only be awarded under 11 U.S.C. § 362(h) when there is corroborating evidence of the emotional distress or the conduct in question is so egregious to make such corroborating evidence unnecessary. 257 B.R. at 251.3

There being no clear Ninth Circuit law to the contrary, the Court will apply the sensible and clear rule of law suggested by the district court in *Aiello*. The Court will not award Mr. Dawson emotional distress damages because there was no corroborating evidence and because the Bank's conduct was not sufficiently egregious dispensing with such evidence.

Special Damages. As noted above, Mr. Dawson claims two items of special damages, $1,440 for physical therapy (massages) and $5,400 in rent. The Bank objected to the lack of corroboration of the expenses. It also objected that, even if Mr. Dawson did actually incur these expenses, the evidence is insufficient to establish that he incurred them as a result of the Bank's violation of the automatic stay.

The Court agrees with the latter objection. The Court will accept as true for purposes of this analysis that Mr. Dawson actually incurred these expenses despite the lack of corroborating evidence. If the compensability of these damages turned on whether Mr. Dawsons actually incurred

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standard for determining when they are recoverable. However, its holding is consistent with the approach adopted by the *Aiello* court.

2 The district court noted that one case in which the court made a nominal damage award even though the violation was slight. However, the district court disagreed with this approach, contending that no award should be made under these circumstances. 257 B.R. at 251, n.3.

3 The author of the district court opinion, the Honorable David Coar, was formerly a bankruptcy judge and therefore has particular expertise with respect to bankruptcy issues.

them, the Court would wish to have Mr. Dawson testify in person so as to judge his credibility.

However, the Court finds it more probable than not that these expenses were incurred as a result of the Dawsons' financial difficulties as a whole and not simply as a result of the Bank's improper filing of an unlawful detainer action. As discussed above and in the Memorandum, the Dawsons no longer owned the Real Property when the stay violation occurred. Although the filing of the unlawful detainer action violated the automatic stay and was therefore void, the Bank could easily and quickly have obtained relief from the automatic stay and filed a new unlawful detainer action. Thus, any damages incurred by Mr. Dawson as a result of the stay violation would have been incurred in any event had the Bank not violated the automatic stay. They simply would have been incurred a few weeks later. Therefore, Mr. Dawson's request for special damages will also be denied.

[Extraneous Text Omitted]

Dated: March 30, 2001

/s/
LESLIE TCHAIKOVSKY
United States Bankruptcy
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re	No. C 01-02367 CW
GEORGE E. DAWSON and BARBARA J. DAWSON, Debtors. _____/	Bkcy. Court No. 98-4796 AT ORDER REVERSING JUDGMENT OF BANKRUPTCY COURT, IN PART, AND REMANDING FOR FURTHER PROCEEDINGS
GEORGE E. DAWSON and BARBARA J. DAWSON, Plaintiffs/Appellants, v.	
WASHINGTON MUTUAL BANK, F.A., successor to GREAT WESTERN BANK, Defendant/Appellee. _____/	[Filed September 4, 2002, U.S. District Court, Oakland]

Appellants George and Barbara Dawson (the Dawsons) appeal the judgment of the bankruptcy court in their above entitled adversary proceeding. This appeal presents the questions of whether a contract transferred to the Dawsons an equitable interest in certain real property prior to Appellee Washington Mutual Bank's foreclosure on its deed of trust secured by that property and whether payments accruing during the time of the foreclosure and damages arising from the

foreclosure must be re-determined.1 Having considered all of the papers filed by the parties, the Court REVERSES the judgment of the bankruptcy court, in part, AFFIRMS it in part, and REMANDS for further proceedings.

BACKGROUND

The Dawsons have resided at 3490 Ridgewood Way, Richmond, California (the Property) for over ten years. Excerpt of Record, (ER) Ex. 6, ¶ 1. In 1987, the Dawsons acquired the Property from Bill Hayes, Jr. ER Ex. 24 at 3. Hayes had acquired the Property in 1987 and had obtained a loan (the Loan), secured by a first deed of trust, from Great Western Savings, the predecessor to Washington Mutual Bank (the Bank). ER Ex. 6, ¶ 1; ER Ex. 24 at 3-4. After Hayes deeded the Property to the Dawsons, the Dawsons took occupancy and began making the payments on the Loan.2 ER Ex. 24 at 3.

On or about October 20, 1989, the Dawsons executed a second deed of trust to secure an obligation of $40,000. ER Ex. 24 at 17. On August 31, 1992, the second deed of trust was assigned to Robert and Arthmethia Dixon. *Id.*

A. First Deed of Trust

In 1993, the Dawsons began to experience difficulty in repaying the Loan. ER Ex. 24 at 3. On May 18, 1993, the Dawsons filed a chapter thirteen bankruptcy petition. ER Ex. 6, ¶ 2; ER Ex. 24 at 3-4. On October 13, 1993, the chapter thirteen plan was confirmed. ER Ex. 24 at 3. On July 1, 1994, based on the Dawsons' post-petition default on the Loan, the

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1 A May 17, 2000 pre-trial order issued by the bankruptcy court set out twenty issues to be decided in the adversary proceeding. *See* ER Ex. 16. The Dawsons appeal the following issues: 1) the effect of the Jameson Agreement (issue seven); 2) loan payments accruing between February, 1996, and August 1996, (issue ten); and 3) the amount of their claim for damages (issue twenty).

2 The Dawsons never formally assumed the Loan. This fact was not at issue in the dispute. ER Ex. 24 at 3.

Bank filed a motion for relief from stay.3 ER Ex. 24 at 4. On July 29, 1994, the Bank obtained an "adequate protection" order that provided that the automatic stay would terminate on August 18, 1994, if the Dawsons failed to make certain payments by that date. *Id.* The Dawsons failed to make the required payments and the stay terminated on August 18, 1994. *Id.* A foreclosure sale was scheduled for February 25, or 27, 1995. *Id.* On February 23, 1995, the Dawsons tendered payment to the Bank and the foreclosure proceedings were discontinued. *Id.*

Between March 30, 1995, and September 30, 1995, the Dawsons made payments on the Loan but the payments were not for the total amount due. ER Ex. 24 at 14-16. On October 2, 1995, the Bank recorded a notice of default, ER Ex. 24 at 15, and on January 16, 1996, the Bank recorded a notice of sale. ER Ex. 17, Ex. O. The notice indicated that the foreclosure sale would take place on February 8, 1996. ER Ex. 6, ¶ 3; ER Ex. 17, Ex. O. On February 8, 1996, the foreclosure sale took place and the Bank took title to the Property on February 14, 1996. ER Ex. 24 at 19, 22. On August 8, 1996, the Bank rescinded the foreclosure sale. ER Ex. 24 at 22.

B. Second Deed of Trust

Meanwhile, on July 18, 1994, the holders of the second deed of trust, the Dixons, had recorded a notice of default against the Property. ER Ex. 24 at 17. On October 12, 1995, a foreclosure sale was conducted. ER Ex. 24 at 17. On February 5, 1996, a trustee's deed upon sale transferring title to the Dixons was recorded. ER Ex. 24 at 17. Also on February 5, 1996, the Dixons signed an assignment of the second deed of trust transferring their interest to Bobbie and Arrece Jameson, the Dawsons' relatives. ER Ex. 24 at 17-18; ER Ex. 17 at 56-57.

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3 Upon the filing of the bankruptcy petition, 11 U.S.C. § 362 protects a debtor by instituting an automatic stay of the commencement or continuation of certain actions by creditors.

On February 6, 1996, the Jamesons signed a document titled "Agreement Re: Foreclosure on 3490 Ridgewood Way, Richmond, California" (Jameson Agreement). Appellant Ex. B; ER Ex. 16, ¶ 7. Barbara Dawson had previously signed the Jameson Agreement on January 16, 1996, and George Dawson signed it on January 17, 1996. Appellant Ex. B. The Jameson Agreement was never recorded. ER Ex. 16, ¶ 7. The Jameson Agreement provided that after the Dixons' foreclosure of the Property was complete and title was vested in the Jamesons, the following conditions would be completed in order: 1) the Dawsons would "cure the foreclosure on the first deed of trust" and keep the Loan payments current thereafter; 2) the Dawsons would arrange for a second loan to be secured by the Property by Joan Foggy (Foggy Loan), a loan officer,4 and the funds from the Foggy Loan would be disbursed in the following manner, a) the Jamesons would receive $45,000 plus attorneys' fees and miscellaneous expenses incurred in the transaction, plus $1,000 cash for their time and effort; b) Mr. George Dawson, Sr.5 would receive $12,000; and c) any remaining proceeds would go to the Dawsons; 3) upon completion of these conditions, the Jamesons would deed the Property to the Dawsons and the Jamesons would be released of any liability arising out of the transaction. Appellant Ex. B; ER Ex. 24 at 18. The Jameson Agreement also provided that the entire agreement must be completed within thirty working days from the date of execution. *Id.* On February 8, 1996, a grant deed was recorded transferring the Dixons' interest in the Property to the Jamesons. ER Ex. 24 at 18; ER Ex. 17 at 63. The

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4 The language of this second condition does not indicate if the Dawsons were to be the promisors of the Foggy loan. Because the intent of the Jameson Agreement is to transfer ownership and title of the Property to the Dawsons, and because the Foggy Loan was to be secured by the Property, the Dawsons would have to be the promisors.

5 George Dawson, Sr. is the Appellant George Dawson's father.

Bank's foreclosure sale took place that same date. ER Ex. 24 at 22.

C. Unlawful Detainer Action

On February 6, 1996, George Dawson filed a chapter seven bankruptcy petition. ER Ex. 24 at 18. Whether and when Mr. Dawson provided notice to the Bank of his bankruptcy filing and the Jameson Agreement was disputed in the proceedings before the bankruptcy court. ER Ex. 24 at 21-23. The bankruptcy court found that by February 20, 1996, the Bank had knowledge of George Dawson's bankruptcy case. ER Ex. 24 at 24. Because it found that the Bank's foreclosure sale held on February 8, 1996 did not violate George Dawson's automatic stay, the bankruptcy court determined that a finding of when the Bank received notice of the Jameson Agreement was not necessary. ER Ex. 24 at 21-22.

On February 14, 1996, the day the Bank took title to the Property after its foreclosure sale, the Bank's bankruptcy attorney filed a request for notice in George Dawson's chapter seven bankruptcy case. ER Ex. 24 at 22-23. On February 20, 1996, the Bank served a notice to quit on the Dawsons. ER Ex. 24 at 22. On February 27, 1996, the Bank instituted an unlawful detainer action against the Dawsons. *Id.* On March 1, 1996, the Dawsons were served with the complaint. *Id.* Also, on March 1, 1996, the Bank's unlawful detainer attorney received notice of George Dawson's bankruptcy filing. *Id.* On March 14, 1996, the Bank dismissed the unlawful detainer action. *Id.* On July 19, 1996, an order discharging George Dawson was entered in his chapter seven case. ER Ex. 17 at 78. On July 23, 1996, George Dawson's chapter seven bankruptcy case was closed. *Id.* Barbara and George Dawson state that at the time of the unlawful detainer action, Barbara and her daughter continued to live at the Property while George moved into a rental residence for six months starting sometime in late February, 1996, or early March 1996. ER Ex. 27, ¶ 6; ER Ex. 28 ¶ 6.

D. Underlying Adversary Proceeding

1. Procedural History

On June 2, 1998, George and Barbara Dawson filed the instant chapter thirteen bankruptcy case. ER Ex. 17, Ex. L-2. On July 15, 1998, the Bank filed a proof of claim in the amount of $243,646.67 secured by the Property. ER Ex. 1, ¶ 12. On September 21, 1998, the Dawsons filed an adversary complaint captioned "Complaint to Determine Nature, Extent and Validity of Lien; Damages for Violation of Stay; Notice of Objection to Claim; Demand for Trial by Jury" (Adversary Complaint). ER Ex. 1. In the Adversary Complaint, the Dawsons alleged four claims, (1) determination of the amount of arrearages the Dawsons owed the Bank under the Loan; (2) objection to the amount of the proof of claim filed by the Bank; (3) violation of George Dawson's automatic stay based on the Bank's 1996 trustee's sale and eviction action; and (4) an unlawful trustee's sale in 1997. ER Ex. 1, ¶¶ 6, 10, 12. On the third claim, for violation of the automatic stay, the Dawsons sought attorneys fees and general and punitive damages under 11 U.S.C. § 362(h). *Id.* at ¶ 16. On February 22, 2000, the Bank filed an amended proof of claim in the amount of $228,628.01. ER Ex. 17, Ex. N-2. On May 17, 2000, the bankruptcy court issued a pre-trial order superseding the Adversary Complaint. *See* ER Ex. 16. The pre-trial order set out twenty issues to be decided in the adversary proceeding. *Id.* The fourth claim in the Adversary Complaint was eliminated in the pretrial process.

In the adversary proceeding, the Dawsons argued to the bankruptcy court that the Jameson Agreement was an installment land sale contract which transferred an equitable ownership interest in the Property to them.6 ER Ex. 24 at 19. They reasoned that when George Dawson filed his bankruptcy

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6 Because the Designation of Record on Appeal does not include the Dawsons' trial brief the following arguments are taken from the bankruptcy court's October 1, 2000 memorandum of decision. (ER Ex. 24).

petition on February 6, 1996, the Property came under the protection of the automatic stay. *Id.* Thus, they asserted that the February 8, 1996, foreclosure sale of the Property by the Bank was void. *Id.* Additionally, the Dawsons argued that the February 27, 1996, unlawful detainer action constituted a stay violation because the Bank had notice of George Dawson's bankruptcy filing on February 6, 1996, or at the latest, by February 14, 1996, when the Bank filed a request for special notice. *Id.* at 23.

The Dawsons also argued that they were entitled to relief from Loan payments and other charges accruing from February, 1996, through August, 1996, because the Bank owned the Property at that time of its wrongful foreclosure. *Id.* at 25. The Dawsons sought actual, punitive, and emotional distress damages based on the Bank's willful, violation of the automatic stay. *Id.* at 41.

2. Bankruptcy Court Decision

On October 1, 2000, the bankruptcy court issued its memorandum of decision which addressed liability and, on March 30, 2001, it issued a second memorandum of decision which addressed damages. *See* ER Exs. 24, 37. In the October 1, 2000 decision, the bankruptcy court determined that the James Agreement was not an installment land contract sale with the Dawsons, but was an option agreement which did not convey equitable ownership interest in the Property to the Dawsons. ER Ex. 24 at 17-21. Based upon the fact that the Dawsons were not equitable owners of the Property when the Bank foreclosed on February 8, 1992, the bankruptcy court concluded that the Bank's foreclosure did not violate the automatic stay. ER Ex. 24 at 17-21. Because the Bank's foreclosure sale was not wrongful, the bankruptcy court exercised its discretion to restore the parties to their prior positions as if the sale had never occurred. ER Ex. 24 at 26. Therefore, the bankruptcy court deemed that the Bank was the

secured creditor rather than the owner of the Property from February 8, 1996, through August 8, 1996 and thus the Bank was owed all outstanding Loan payments that had accrued and reimbursement of any real property tax advances the Bank had made during that time. ER Ex. 24 at 26, 39-40.

The bankruptcy court concluded that the Bank violated the stay when it served the Dawsons with a notice to quit on February 20, 1996, and filed the unlawful detainer action on February 27, 1996. ER Ex. 24 at 24. The court determined that by February 20, 1996, the Bank, through its bankruptcy counsel, had knowledge of George Dawson's bankruptcy case because the Bank's counsel had filed a request for special notice in the bankruptcy case on February 14, 1996. ER Ex. 24 at 23-24. The court imputed the knowledge of the Bank's counsel to the Bank itself. ER Ex. 24 at 24. Although it determined the stay violation was inadvertent rather than purposeful because the Bank's unlawful detainer attorney only received notice of George Dawson's bankruptcy on March 1, 1996, the court concluded that George Dawson must be compensated for actual damages incurred from February 20, 1996, the date the Dawsons were served with the notice to quit, through March 14, 1996, the date the Bank dismissed the unlawful detainer action. *Id.*; ER Ex. 37 at 4.

In the March 30, 2001, decision, the bankruptcy court awarded attorneys' fees in the amount of $2,307.60 to the Dawsons for legal expenses incurred in litigating the unlawful detainer action, the only issue on which they prevailed.7 ER Ex. 37 at 15-18. The bankruptcy court did not award George Dawson emotional distress or special damages. ER Ex. 37 at 11-15. The bankruptcy court found in favor of the Bank on a number of other issues set out in the pre-trial order which the Dawsons do not appeal. *See* ER Ex. 24.

On June 12, 2001, the Dawsons timely filed the instant appeal of the bankruptcy court's judgment.

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7 This amount included $200 for the work of Fayedine Coulter, their original attorney in the unlawful detainer action. ER Ex. 37 at 16.

JURISDICTION AND STANDARD OF REVIEW

The district court has jurisdiction over this appeal under 28 U.S.C. § 158(a). The bankruptcy court's conclusions of law are reviewed *de novo* and its findings of fact under the clearly erroneous standard. Fed. R. Bankr. 8013; *In re Wagner*, 839 F.2d 533, 536 (9th Cir. 1988).

DISCUSSION

I. The Jameson Agreement

As noted, in the adversary proceeding, the Dawsons argued that the Jameson Agreement should be viewed as an installment land sale contract which transferred an equitable interest in the Property to them. ER Ex. 24 at 19. The Bank argued that the Jameson Agreement merely created a contractual relationship between the Dawsons and Jamesons which did not affect title to the Property. *Id.* Rejecting the Dawsons' contention, the bankruptcy court concluded that the Agreement was an option contract which did not transfer an equitable interest in the Property to the Dawsons. ER Ex. 24 at 21.

This ruling is the crux of the Dawsons' appeal. The Dawsons argue that, because the bankruptcy court's interpretation of the contract was in error, its decision regarding the extent of the stay violation and damages was also in error.

The bankruptcy court's interpretation of the Jameson Agreement is reviewed *de nova. Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985) (requiring de novo review if decision is based on analysis of contractual language and an application of the principles of contract interpretation). Under 11 U.S.C. § 541, the commencement of a bankruptcy case creates an estate that includes all legal or equitable interests of the debtor. State law determines the extent of such interests and when they expire. *In re Contractors Equip. Supply Co.*,

861 F.2d 241, 244 (9th Cir. 1988); *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986).

A. Option Contract

"A contract conferring an option to purchase is . . . an irrevocable and continuing offer to sell, and conveys no interest in the land to the optionee, but vests in him only a right in personam to buy at his election. Thus it had been held in California that an option to purchase real property is by no means a sale of property, but is a sale of a right to purchase and on acceptance the option becomes a contract of sale binding on both parties." *Palo Alto Town & Country Village, Inc. v. Bbtc Co.*, 11 Cal. 3d 494, 503 (1974). The test of whether an agreement is "an option or a contract of sale is whether there is such an obligation on the part of the [optionee] to buy, that it can be enforced by specific performance." *People v. Ocean Shore R. Co.*, 90 Cal. App. 2d 464, 469-470 (1949), ("where it appears that the general intention was to consummate a sale, . . . it will be held to be a contract of purchase and sale"), *disapproved on other grounds by County of San Diego v. Miller*, 13 Cal. 3d 684, 689-691, 693 (1975). Additionally, an option requires separate consideration paid to the offeror that is indendent from the consideration to be given by the terms of the underlying purchase contract. *Wheat v. Morse*, 197 Cal. App. 2d 203, 206-207 (1961); *Walter G. Reese Co. v. House*, 162 Cal. 740, 744-45 (1912); 1 Miller & Starr, *California Real Estate: The Specific Real Estate Contracts* § 2:7 (3d ed.); see *also Palo Alto*, 11 Cal. 3d at 502 (option is a "promise exchanged for sufficient cash consideration"); *Lawrence v. Settle*, 182 Cal. App. 2d 386, 389 (1960) ("when given for lawful consideration," option cannot be revoked within stipulated time period).

There are two reasons to conclude that the Jameson Agreement is not an option contract. First, the Jameson Agreement does not require separate consideration to be paid by the Dawsons for the right to purchase the Property sometime in the future. Second, the intent of the contracting

parties is that a sale would be consummated within thirty days, not at some time in the future. It does not give the Dawsons the right to decide not to buy the Property as would an option contract. Thus, the Dawsons were obliged to buy the Property such that the Jamesons could enforce specific performance. Therefore, the Jameson Agreement is not an option contract, and the bankruptcy court's characterization was erroneous.

B. Installment Land Sale Contract

In California, there are two different types of "contracts of sale" for the purchase of real property: an installment land sale contract and a marketing contract. Miller & Starr at § 2:11. An installment land sale contract is a contract of sale that provides for "periodic installment payments on account of the purchase price while the seller retains legal title." *Id.* It acts as a security device in which "the seller agrees to convey legal title to the buyer at some future date, usually, but not necessarily, on payment of the full purchase price" *Id.* The equitable ownership of the property vests in the buyer at the time the contract is executed. *In re Estate of Dwyer,* 159 Cal. 664, 675 (1911). Installment land sale contracts are regulated by California Civil Code §§ 2985-2985.6. Section 2985 provides,

> A real property sales contract is an agreement wherein one party agrees to convey title to real property to another party upon the satisfaction of specified conditions set forth in the contract and which does not require conveyance of title within one year from the date of formation of the contract.

The Jameson Agreement requires conveyance of title within thirty working days from the date of its execution. *See* Appellant Ex. B. The Jameson Agreement does not satisfy § 2985 which requires that installment land sale contracts cannot convey title within one year from the date of their formation.

Therefore, the bankruptcy court was correct that the Jameson Agreement is not an installment land sale contract.

C. Marketing Contract

A marketing contract is a contract for the sale of real property in which the parties contemplate an immediate transfer of title in exchange for payment of the purchase price. Miller & Starr at § 2:11. "The unpaid portion of the purchase price usually is evidenced by a promissory note secured by a deed of trust on the property sold." *Id.*

In the Jameson Agreement, the parties agreed that the Jamesons would convey title to the Dawsons and that the Dawsons, within thirty days, would cure any defaults on the first deed of trust, keep all payments current, and obtain a second loan, the proceeds of which were to go to the Jamesons and George Dawson's father. Because the parties contemplated an immediate transfer of title and payment, the Jameson Agreement constituted a marketing contract. That the entire contract was to be completed within thirty days was a condition that had to be met in order to require the Jamesons to perform. Because the contract contemplated the passing of the title to real property, it was not merely a private agreement between the Dawsons and Jamesons that did not affect the Property as contended by the Bank.

D. Equitable Conversion in a Contract of Sale

"The doctrine of equitable conversion is a mere fiction, which rests on the maxim that equity regards as done that which should have been done." *Mamula v. McCulloch*, 275 Cal. App. 2d 184, 193 (1969). In other words, "where there is a mandate to sell [real property] at a future time, equity . . . will for certain purposes and in aid of justice consider the conversion [of the property]" to have occurred "at the time the sale ought to [have] taken place," without regard to whether the land has actually been sold. *In re Estate of Walkerly*, 108 Cal. 627, 652 (1895); *Vigil v. Davis*, 79 Cal. App. 2d 237, 255 (1947). When a binding, executory contract for the sale of real property is entered into, an equitable conversion is worked

where the purchaser becomes the equitable owner of the property and the seller becomes the owner of the purchase price. *In re Estate of Dwyer*, 159 Cal. 664, 675 (1911); *see also Abrams v. Motter*, 3 cal. App. 3d 828, 847 (1970) ("an equitable exchange takes place whenever a contract to purchase land is formed [and] at that moment, the purchaser becomes the equitable owner of the land and the vendor's interest is the unpaid purchase price"); *Commisioner of Internal Revenue v. Swift*, 54 F.2d 746, 750 (9th Cir. 1932) ("It is frequently said by the courts of California that, at the time of execution of a contract for sale of land, the purchaser acquires the equitable estate").

However, "the equitable conversion thus deemed to exist from the time a valid contract of sale is entered into may or may not be absolute. Whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with." *Id.* For example, upon a purchaser's failure to complete a contract of purchase, "his wrongful act divests himself of the equitable estate which he had acquired under the writing and . . . a vendor may maintain ejectment." *Kelso v. Ulrich*, 67 Cal. App. 2d 698, 70 (1945). Therefore, "by the execution of a valid enforceable contract to sell real estate the vendee becomes the equitable owner of the title, subject only to be divested thereof for breach of the contract." *In re Reid's Estate*, 26 Cal. App. 2d 362, 369 (1938); *Alhambra Redev. Agency v. Transam. Fin. Servs.*, 212 Cal. App. 3d 1370, 1376 (1989).

In the instant case, upon the parties' execution of the Jameson Agreement, an equitable conversion was worked whereby the Dawsons became equitable owners of the Property and the Jamesons retained legal title until the Dawson fulfilled the terms of the contract. Therefore, from the time the parties entered into the Jameson Agreement, unless and until the Dawsons breached it, the Dawsons possessed an equitable interest in the Property. Based on this conclusion, the Court remands the case to the bankruptcy court to determine when

the Bank knew of the Jameson Agreement and if the Bank's foreclosure sale violated the automatic stay. Specifically, the bankruptcy court must resolve the following disputed facts.

First, the record does not indicate whether the Dawsons fulfilled any of the terms of the Jameson Agreement within the required thirty days. If not, their failure to act may have divested them of their equitable interest in the Property at the end of the thirty days. Second, it is not clear when and if the Bank received notice of the Jameson Agreement. The Bank may not have known of the Dawsons' interest before its foreclosure sale on February 8, 1996, because the title transfer to the Jamesons was not recorded until February 8, 1996. If the Bank did not receive both notice of the James Agreement before its foreclosure sale and notice of George Dawson's bankruptcy before February 20, 1996,8 any violation found to exist may have been inadvertent rather than willful.

Only willful violations of an automatic stay require an award of damages under 11 U.S.C. § 362(h). Under § 362 (h),

> An individual injured by any willful violation of the automatic stay provided by this section shall recover actual damages, including costs and attorneys fees, and, in appropriate circumstances, may recover punitive damages.

"A 'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded." *In re Bloom*, 875 F.2d 224, 227 (9th Cir. 1989).

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8 The bankruptcy court determined by February 20, 1996, the Bank had notice of George Dawson's bankruptcy case. ER Ex. 24 at 24.

Upon remand, the bankruptcy court must determine whether the foreclosure sale on February 8, 1996, was a violation and if so, gave rise to any damages under 11 U.S.C. § 362(h) in light of this Court's conclusion that the Dawsons possessed an equitable interest in the Property.

II. Bankruptcy Court's Determination of Damages

A. Post-Foreclosure Payments

The Dawsons submit that the bankruptcy court's determination of post-foreclosure payments must be revisited because the court failed to recognize them as equitable owners of the Property.

The bankruptcy court exercised its discretion to restore the parties to their prior positions as if the foreclosure sale had never occurred because it determined that the Bank's foreclosure sale did not violate the stay. ER Ex. 24 at 26. The bankruptcy court concluded that the Bank was owed all outstanding Loan payments and real property taxes from February 8, 1996, though August 8, 1996. ER Ex. 24 at 39-40.

Even if the foreclosure sale was void because the Dawsons possessed an equitable interest in the Property, the Dawsons were required to cure the outstanding post-foreclosure payments as equitable owners of the Property. In fact, the Dawsons obliged themselves to cure the foreclosure on the first deed of trust in the Jameson Agreement. Therefore, the Court affirms the conclusion by the bankruptcy court that the Bank is owed all outstanding post-foreclosure payments.

B. Emotional Distress Damages

The Dawsons argue that the bankruptcy court erred when it failed to award emotional distress damages to George Dawson for the stay violation because he did not corroborate his claims and because the stay violations were not sufficiently egregious. The Bank submits that the bankruptcy court properly relief on *Aiello v. Providian Fin. Corp.*, 257 B.R. 245 (N.D. Ill. 2000), affirmed 239 F.3d 876 (7th Circ. 2001) to support its denial of emotional distress damages.

Because the Dawsons challenge the bankruptcy court's application of relevant law, its conclusions are reviewed *de novo*. *In re Wagner*, 839 F.2d 533, 536 (9th Cir. 1988).

The bankruptcy court noted that the Ninth Circuit has not addressed the standard for recovery of emotional distress damages under § 362(h) or if such damages are even recoverable under the statute. The bankruptcy court found the reasoning in *Aiello* persuasive. In *Aiello*, the court determined that emotional distress damages should be awarded under § 362(h) if there is supporting evidence of emotional distress or if the conduct is "sufficiently offensive" or "egregious" that emotional distress is presumed. *Aiello*, 257 B.R. At 250-251. On this basis, the bankruptcy court denied George Dawson emotional distress damages because the unlawful detainer violation was not "sufficiently egregious" and he did not submit supporting evidence of his emotional distress beyond his own declaration. ER Ex. 37 at 4-5, 14."9

Like the bankruptcy court, this Court could not locate Ninth Circuit authority which establishes or discusses the standard for recovery of emotional distress damages under § 362(h). However, nothing prevents a court from considering persuasive authority from other jurisdictions. Therefore, in the absence of controlling authority, the bankruptcy court properly relied on the standard set out in *Aiello*.

The Dawsons argue that the bankruptcy court misapplied *Aiello* because the Seventh Circuit's holding that no emotional distress damages are awardable without a financial injury is distinguishable. The Dawsons submit that George Dawson incurred financial injury as a result of the stay violation because he had to retain an attorney to correct it.10

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9 Because the chapter seven bankruptcy case was filed by George Dawson, only damages arising from his emotional distress are recoverable; any emotional distress suffered by Barbara Dawson is not an issue.

10 The Dawsons also argue under *Johnstone v. Bank of Am., N.A.*, 173 F. Supp. 2d 809, 816 (N.D. Ill, 2001), the financial injury need not be great. However, *Johnstone* is inapplicable because it addresses damages awardable

The Dawsons misconstrue the Seventh Circuit's opinion in Aiello. The Seventh Circuit stated that if there is a financial injury, a claimant "might be permitted to piggyback a claim for damages for incidental emotional distress." *Aiello,* 239 F.3d at 881. The Seventh Circuit did not conclude that financial injury is enough to obtain an award for emotional distress damages under § 362(h). Therefore, it did not disturb the district's court's holding that a claimant would be subject to "supporting evidence" requirements if the stay violation was minor or innocuous in nature.

Because the unlawful detainer action was resolved in a matter of days and because knowledge of the bankruptcy was only imputed to the Bank, the bankruptcy court properly determined that the Bank's stay violation was not egregious. ER Ex. 37 at 4, 14. Nevertheless, the bankruptcy court will have to consider upon remand if emotional distress damages are warranted if it finds further violation of the stay by the Bank's foreclosure sale.

C. Special Damages

The Dawsons argue that the bankruptcy court arbitrarily disregarded uncontradicted evidence of George Dawson's pecuniary damages in the amount of $1,440 for physical therapy and $5,400 for six months of rent of another residence. According to George Dawson, these damages arose out of his fear of eviction upon receiving the Bank's notice to quit.[11] ER Ex. 27, ¶¶ 6, 10.

Because the Dawsons challenge the bankruptcy court's findings of fact, the court's decision is reviewed under the clearly erroneous standard. *In re Wagner*, 839 F.2d 533, 536 (9th Cir. 1988).

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under the Real Estate Settlement Procedures Act (RESPA), not 11 U.S.C. § 362(h).

11 The record is not clear as to why George Dawson secured a separate residence for six months when the Bank dismissed its unlawful detainer action after only three weeks.

The bankruptcy court assumed that George Dawson incurred these expenses despite the lack of supporting evidence such as receipts or bills. ER Ex. 37 at 14. However, the court found that under the circumstances of the case, it was more probable than not that these expenses were a result of the Dawsons' overall financial difficulties, rather than of the unlawful detainer action. ER Ex. 37 at 14-15. The court also concluded that George Dawson would have suffered these damages whether or not the Bank violated the relief from the stay and then lawfully could have filed an unlawful detainer action. ER Ex. 37 at 15. On these bases, special damages were denied.

The bankruptcy court's reasoning did not depart from any established legal standards or ignore the basic rule of causation. Therefore, the Court concludes that the bankruptcy court's decision to deny special damages relating to the Bank's unlawful detainer action was not clearly erroneous. However, the bankruptcy court must revisit the issue of whether special damages arose from the Bank's foreclosure sale if it violated the automatic stay.

D. Attorneys' Fees

The Dawsons argue that the bankruptcy court failed to follow well-settled principles in its award of attorneys' fees and seek to recover $50,600 for the services of attorney A. Charles Dell'Ario.12 The Bank argues that the bankruptcy court did not abuse its discretion in its award of attorneys' fees and that the authority cited by the Dawsons is not applicable to attorneys' fees and that the authority cited by the Dawsons is not applicable to attorneys' fees under § 362(h). The bankruptcy court determined that the Dawsons were entitled to recover the attorneys' fees incurred in obtaining the dismissal of the unlawful detainer action. ER Ex. 37 at 16. The bankruptcy court awarded the Dawsons one-twentieth of

12 The Dawsons do not dispute the bankruptcy court's decision to award $200 for the work of Fayedine Coulter, their original attorney in the unlawful detainer action.

attorney Dell'Ario's fees and costs for pursuing the adversary proceeding because the Dawsons prevailed on only one out of the twenty issues litigated. ER. Ex. 37 at 17. The court used the actual hourly rate that Dell'Ario charged the Dawsons as a reasonable rate and concluded that an award of $2,107.60 was one-twentieth of $42,152.12, the total of Dell'Ario's actual fees. ER Ex. 37 at 17-18. In sum, the court awarded damages to the Dawsons in the amount of $2,307.60 consisting of the $200 paid for one hour of Coulter's time and $2,107.60 paid to Dell'Ario. ER Ex. 37 at 18.

If the bankruptcy court finds a violation of the automatic stay by the Bank's foreclosure sale, it must determine if the Dawsons are entitled to a larger award of attorneys' fees. However, because the Dawson's argument on attorneys' fees raises several questions of law, the Court addresses these contentions below.

"A bankruptcy court's award of attorney's fees is reviewed for an abuse of discretion or an erroneous application of the law." *In re Del Mission, Ltd.*, 98 F.3d 1147, 1152 (9th Cir. 1996); *In re Lazar*, 83 F.3d 306, 308 (9th Cir. 1996); *In re Occidental Financial Group, Inc.*, 40 F.3d 1059, 1062 (9th Cir. 1994).

In the Ninth Circuit, reasonable attorneys' fees are determined b first calculating the "lodestar." *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987). The lodestar is found "by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986); *reh'q denied, opinion amended on other grds.*, 808 F.2d 1371 (9th Cir. 1987); *accord, Keith v. Volpe*, 833 F.2d 850, 859 (9th Cir. 1987). There is a strong presumption that the lodestar figure represents a reasonable fee. *Jordan*, 815 F.2d at 1262.

In calculating the lodestar, the court must determine both a reasonable number of hours and a reasonable hourly rate for each attorney. *Chalmers*, 796 F.2d at 1210. In calculating a reasonable number of hours, the applicant must justify his or

her claim by submitting detailed time records. The court may adjust these hours down if it believes the documentation to be inadequate, if the hours were duplicative, or if the hours were either excessive or unnecessary. *Id.* An award adjustment of the lodestar is appropriate only in extraordinary cases, such as when the attorneys faced exceptional risk of not prevailing or not recovering any fees. *Id.* at 1212.

Determining a reasonable hourly rate is a critical inquiry. *Jordan,* 815 F.2d at 1262 (citing *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). The court must consider several factors including the experience, skill and reputation of the applicant. *Chalmers*, 796 F.2d at 1210. The court must look to the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience and reputation; it may not refer to the rates actually charged to the prevailing party. *Id.* at 1210-11. It is the applicant's burden to produce evidence, other than the declarations of interested counsel, that "the requested related are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263. In addition, in figuring a reasonable fee, the court should consider the outcome of the action, the customary fees, and the novelty or difficulty of the issues presented. *Chalmers*, 796 F.2d at 1211; *Hamner v. Rios*, 769 F.2d 1404, 1407-09 (9th Cir. 1985)).

The Supreme Court has recognized that, although it is appropriated for the district court to exercise it discretion in determining an award of attorneys' fees, it remains important for the district court to provide "a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Chalmers*, 796 F.2d at 1211 (award vacated and remanded for district court's failure to explain basis for award); *Hall v. Bolger*, 768 F.2d 1148, 1151 (9th Cir. 1985) (in computing an award, the district court should provide a "detailed account of how it arrived at appropriate figures for 'the number of hours reasonably expended' and 'a

reasonable hourly rate'") (quoting *Blum*, 465 U.S. at 898). The procedure used by district courts to calculate attorneys' fees is also used by bankruptcy court to determine attorneys' fees under 11 U.S.C. § 362(h). *See In re Cedic Dev. Co.*, 219 F.3d 1115, 1116-17 (9th Cir. 2000); *In re Fingers*, 170 B.R. 419, 435 (S.D. Cal. 1994).

1. Reasonable Number of Hours

The Dawsons dispute the bankruptcy court's calculation of the reasonable number of hours spent in litigation on several grounds. First, the Dawsons submit that the bankruptcy court did not correctly calculate the lodestar because it did not use the actual number of hours the prevailing party incurred in litigating the adversary proceeding.

In his declaration to the bankruptcy court, Dell'Ario stated that he billed eighty-eight hours and his associate billed one hundred forty-three hours for work on the adversary proceeding. ER Ex. 26, ¶ 6. However, Dell'Ario did not indicate the number of hours he worked on the stay violation for the unlawful detainer action, the only issue the Dawsons prevailed. Instead, he stated that the "issues in the case were not neatly segregated into compartments from which time can be allocated [and that] no blocks of time were devoted solely to the stay violation [but that his] best estimate is that at least one-half of the time spent was devoted to the stay issues." ER Ex. 6, ¶¶ 8-9.

"Substantively, both the Supreme Court and [Ninth Circuit] cases have emphasized the discretionary nature of the court's determination of the number of hours reasonably expended." *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988). "One factor that may be used to reduce this number is inadequate documentation." *Id.* at (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Therefore, the bankruptcy court did not abuse its discretion by employing its own system of allocation to determine the number of reasonable hours expended by Dell'Ario in light of the information he furnished in his declaration.

Second, the Dawsons argued that they prevailed on all four claims they asserted in their complaint, not merely one out of twenty. Therefore, they contend that the bankruptcy court erred by awarding them one-twentieth of Dell'Ario's fees.

The pre-trial order which set out the twenty issues to be decided in the adversary proceeding indicates that it "shall supersede in all respects the complaint filed by the plaintiff in this proceeding." ER Ex. 16 at 2. Thus, the Dawsons' complaint cannot serve as a basis from which to calculate attorneys' fees.13 However, upon remand, the bankruptcy court must consider the time Dell'Ario spent on any stay violation arising from the foreclosure sale.

Third, citing *Diamond v. John Martin, Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985), the Dawsons argue that the bankruptcy court improperly applied a "meat axe" approach to their attorneys' fee award because their causes of action were intertwined.

"Attorney's fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are proper and one in which they are not allowed." *Id.* (citation omitted). However, the bankruptcy court rejected the argument that the unlawful detainer violation was an issue common to the stay violation claim on which the Dawsons prevailed and to those claims which they lost, because the factual differences between the claims made them severable from each other. ER Ex. 37 at 17. The bankruptcy court noted that the Dawsons could have brought an action against the Bank for the unlawful detainer violation without bringing any other claims.14 ER Ex. 37 at 17. They chose not

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13 The bankruptcy court's decision to allocate attorneys' fees on the basis of one-twentieth of the total claimed by Dell'Ario may also reflect the fact that the Dawsons' original complaint did not lay out the issues efficiently. ER Ex. 24 at 1-2. Instead, after the pre-trial hearing, the bankruptcy court issued a pre-trial order to identify and clarify the issues in dispute. ER Ex. 16.

14 The Court does not consider the Dawsons' argument that no attorney could have litigated the instant action in the bankruptcy court for the amount

to do so. The Court finds these explanations reasonable and concludes that the bankruptcy court did not erroneously calculate the Dawsons' award of attorneys' fees.

Fourth, citing *Quesada v. Thomason*, 850 F.2d 537, 540 (9th Cir. 1988), the Dawsons argue that it was inappropriate for the bankruptcy court to reduce the attorneys' fees award below the lodestar simply because the single item of damages was small. In *Quesada*, the court noted that it was inappropriate to reduce an award of attorneys' fees in a civil rights action simply because the damages obtained are small. "Even in cases seeking only monetary relief, a 'successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damage awards.'" Id. at 540 (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). The Dawsons contend that the automatic stay violation based on the Bank's unlawful detainer action establishes that the Bank did not fulfill its duty to know what its counsel and branches are doing and that a reduction in the attorneys' fee award does not provide a sufficient deterrent effect to prevent future stay violations.

The Court does not find that an important social benefit is to be derived from granting the Dawsons a higher award of attorneys' fees. As the bankruptcy court stated, the stay violation was inadvertent; once the Bank had notice of George Dawson's bankruptcy petition, it dismissed the unlawful detainer action. ER Ex. 37 at 4, n.1. Under these circumstances, a deterrent effect is not necessary and *Quesada* is not applicable. However, upon remand, the bankruptcy court

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awarded. It is not clear if the time estimates the Dawsons furnish in their brief apply to the litigation as it occurred or as it would have occurred in only the prevailing claim was brought. Second, unlike *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145 (9th Cir. 2001), which the Dawsons cite, the instant action was quite complicated and reviewing "billing records for specific inefficiencies" could not be done "without expending a great deal of judicial time." *Id.* at 1150.

will have to revisit its apportionment of fees if it finds that the foreclosure sale violated the stay.

2. Reasonable Hourly Rate

Citing *In re Cedic*, 219 F.3d at 1117, the Dawsons argue that the bankruptcy court erred in awarding the below-market rate charged by Dell'Ario because the fact that they contracted with Dell'Ario for fees below the market rate should not benefit the Bank. See ER Ex. 26, ¶¶ 5, 7 (actual hourly rate: $225; reasonable hourly rate suggested by Dell'Ario: $250). The bankruptcy court determined that the actual hourly rate charged by Dell'Ario constituted a reasonable rate for the services he provided in light of the fact that the majority of the positions he asserted lacked merit. ER Ex. 37 at 17.

The Dawsons did not submit evidence beyond the declaration of Dell'Ario to establish that the rate he requested was in line with those prevailing in the community for similar services. Based on the lack of evidence presented to the bankruptcy court, and its explanation that most of the Dawsons' claims lacked merit, the bankruptcy court did not abuse its discretion by concluding that Dell'Ario's actual hourly rate constituted a reasonable hourly rate.

E. Reduction of Proof of Claim

After the Dawsons filed their Adversary Complaint, the Bank reduced its proof of claim from $243,646.67 to $228,628.01. Although it falls outside the scope of § 362(h), if the bankruptcy court finds it appropriate, it may consider upon remand what litigation efforts, if any, Dell'Ario expended in persuading the Bank to reduce its claim and whether damages are recoverable for such efforts.

CONCLUSION

For the foregoing reasons, the Court REVERSES the judgment of the bankruptcy court, in part, AFFIRMS it in part, and REMANDS for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Dated: September 4, 2002

/s/
CLAUDIA WILKEN
United States District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re GEORGE E. DAWSON and BARBARA J. DAWSON,	No. 02-16903
Debtors.	D.C. No. CV-01-02367-CW
_____/	
GEORGE DAWSON and BARBARA J. DAWSON,	
Plaintiffs-Appellantes,	ORDER
v.	
WASHINGTON MUTUAL BANK, F.A., successor to Great Western Bank,	[Filed December 10, 2004, U.S. Court of Appeals]
Defendant-Appellee.	
_____/	

Before: HALL and GRABER, Circuit Judges, and WEINER,* Senior Judge.

The opinion filed on May 18, 2004, and appearing at 367 F.3d 1174, has been withdrawn by an order filed on

* The Honorable Charles R. Weiner, Senior District Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

October 4, 2004. A new opinion is being filed this date. The petition for rehearing and petition for rehearing en banc filed on June 1, 2004, is denied as moot. Subsequent petitions for rehearing and for rehearing en banc may be filed.

APPENDIX E

FOR PUBLICATION
UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE E. DAWSON and
BARBARA J. DAWSON,

Plaintiffs-Appellants,

v. No. 02-16903

WASHINGTON MUTUAL BANK, F.A., SUCCESSOR TO GREAT WESTERN BANK, D.C. No. CV-00-21274 RMW-PVT

Defendant-Appellees. OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued March 10, 2004
Resubmitted April 23, 2004
San Francisco, California

Filed December 10, 2004
Before: Cynthia Holcomb Hall and Susan P. Graber,
Circuit Judges and Charles R. Weiner,*
Senior District Judge.

Opinion by Judge Graber

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* The Honorable Charles R. Weiner, Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

COUNSEL

A. Charles Dell'Ario, Oakland, California, for the plaintiffs-appellants.

William G. Malcolm, Malcolm Cisneros, Irvine, California, for the defendant-appellee.

OPINION

GRABER, Circuit Judge:

The main question in this case is whether a debtor may recover damages for emotional distress under *11 U.S.C. § 362(h)* when a creditor violates the automatic stay that follows from the filing of a bankruptcy petition. In a previous opinion, *Dawson v. Washington Mutual Bank, F.A.*, 367 F.3d 1174 (9th Cir.), *withdrawn,* 385 F.3d 1194 (9th Cir.2004), we answered that question "no." Upon reconsideration, however, we are persuaded that we erred and now answer "yes."

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs George and Barbara Dawson bought a home located at 3490 Ridgewood Way, in Richmond, California ("the Property"). When they acquired the Property in 1987, they obtained from the predecessor of Defendant Washington Mutual Bank ("the Bank") a loan secured by a first deed of trust. In 1989, Plaintiffs executed a second deed of trust, to secure an obligation of $40,000, in favor of the Dixons, who were friends of Plaintiffs.

Beginning in 1993, Plaintiffs experienced difficulty in making their monthly mortgage payments to the Bank. On May 18, 1993, Plaintiffs filed a Chapter 13 bankruptcy petition and, in October of the same year, the Chapter 13 plan was confirmed.

Plaintiffs again failed to pay what they owed the Bank and, on July 1, 1994, the Bank filed a motion for relief from the automatic bankruptcy stay, *11 U.S.C. § 362.* The Bank obtained an "adequate protection" order providing that the automatic stay would terminate on August 18, 1994, if

Plaintiffs failed to make certain payments. They did fail to make the required payments; accordingly, the stay terminated. A foreclosure sale was scheduled for early 1995 but Plaintiffs tendered payment to the Bank just before the date set for the sale, so the foreclosure proceedings were discontinued.

In 1995 Plaintiffs made payments to the Bank, but for less than the amount due. Thus, on October 2, 1995, the Bank recorded a notice of default. On January 16, 1996, the Bank recorded a notice of sale, stating that a foreclosure sale would take place on February 8, 1996.

Meanwhile, in 1994 the Dixons had recorded a notice of default against the Property. On October 12, 1995, a foreclosure sale was conducted. On February 5, 1996, (a) a trustee's deed upon sale, transferring title to the Dixons, was recorded, 16716 and (b) the Dixons assigned the second deed of trust, transferring their interest, to relatives of Plaintiffs, the Jamesons. Plaintiffs and the Jamesons signed an unrecorded agreement entitled "Agreement Re: Foreclosure on 3490 Ridgewood Way, Richmond, California" ("the Jameson Agreement"). The Jameson Agreement provided that, after the Dixons' foreclosure of the property was complete and title was vested in the Jamesons: (1) Plaintiffs would "cure the foreclosure on the first deed of trust" and keep payments current thereafter; (2) Plaintiffs would arrange for a second loan to be secured by loan officer Joan Foggy, with the funds to be distributed as follows: (a) to the Jamesons, $45,000 plus fees, expenses, and $1,000 for their time and effort; and (b) to Plaintiff George Dawson's father, $12,000; with (c) any remainder to Plaintiffs; and (3) when the foregoing conditions were fulfilled, the Jamesons would deed the property to Plaintiffs. The Jameson Agreement provided for completion of all conditions within 30 working days from the date of execution.

On February 8, 1996, a grant deed was recorded, transferring the Dixons' interest in the property to the Jamesons. That was the same date set for the foreclosure sale.

The sale did occur and the Bank took title to the Property on February 14, 1996. The Bank rescinded the foreclosure sale on August 8, 1996.

Just before the sale, on February 6, Plaintiff George Dawson had filed a Chapter 7 bankruptcy petition. Whether or when notice of that petition was provided to the Bank was in dispute below, but the bankruptcy court found that the Bank had knowledge of it by February 20, 1996, at the latest. On that date the Bank served on Plaintiffs a notice to quit the premises.

On February 27, 1996, the Bank instituted an unlawful detainer action against Plaintiffs. The Bank's lawyer in the unlawful detainer action received notice of the Chapter 7 bankruptcy filing on the same day, February 27. The Bank dismissed the unlawful detainer action on March 14, 1996. Plaintiff George Dawson's Chapter 7 bankruptcy case was closed on July 23, 1996.

Plaintiffs filed the present Chapter 13 bankruptcy case on June 2, 1998. The Bank filed a proof of claim as to Plaintiffs' debt, secured by the Property. Thereafter, Plaintiffs filed an adversary complaint, claiming (as relevant here) emotional distress damages under *11 U.S.C. § 362(h)* for the Bank's violation of the automatic stay in George Dawson's Chapter 7 proceeding.

The bankruptcy court held, among other things, that the Jameson Agreement was an option agreement that did not convey any equitable ownership interest in the property to Plaintiffs and that the Bank's February 1996 foreclosure sale, therefore, did not violate the automatic stay. Because the February 1996 foreclosure sale was not wrongful, the bankruptcy court awarded the remedy of rescission and restored the parties to their prior positions as if that sale had never occurred. As part of this remedy, the bankruptcy court held that Plaintiffs owed the Bank for loan payments that accrued between February and August 1996 (when the Bank rescinded the sale). Further, the bankruptcy court held that the

Bank did violate the stay between February 20 and March 14, 1996 (when the Bank dismissed the unlawful detainer action). The court nonetheless denied George Dawson's claim for emotional distress damages on the grounds that the Bank's violation of the automatic stay was not egregious and that no evidence corroborated the emotional distress claimed. Finally, the bankruptcy court awarded Plaintiffs attorney fees and costs in the amount of $2,307.60.

The district court affirmed all the bankruptcy court's holdings save one. The court held that the Jameson Agreement was actually a marketing contract that *could* transfer an equitable interest in the property to Plaintiffs. Therefore, the Bank may have violated the automatic stay with its February 1996 foreclosure sale, because Plaintiffs may have had an equitable interest in the property at the time. However, whether they actually held such an interest depended on several facts (such as whether the Jameson Agreement's requirements had been fulfilled) that were in dispute. Therefore, the district court remanded the case to the bankruptcy court for further findings on this and related issues.

Plaintiffs timely appealed to this court.1

STANDARDS OF REVIEW

We review de novo a district court's decision on appeal from a bankruptcy court. *Batlan v. TransAm. Commercial Fin. Corp. (In re Smith's Home Furnishings, Inc.),* 265 F.3d 959, 962-63 (9th Cir.2001). That is, we review the bankruptcy court's decision independently and give no deference to the district court's determinations. *Id.* at 963.

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1 The Bank filed a no cross-appeal. Therefore, the Bank's argument that we should *reverse* the district court's holding that Plaintiffs held equitable title to the Property is not properly before us. *See El Paso Natural Gas Co v. Neztsosie,* 526 U.S. 473, 379 (1999) (holding that, in the absence of a cross-appeal, an appellee may urge affirmance of the lower court's ruling on any basis appearing in the record, "but may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary" (internal quotation marks omitted)).

We review for clear error the bankruptcy court's findings of fact, but we review de novo its conclusions of law. *Id.*

A bankruptcy court's award of attorney fees is reviewed for abuse of discretion or erroneous application of the law. *Cal. Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.),* 98 F.3d 1147, 1152 (9th Cir.1996).

DISCUSSION

A. *Jurisdiction*

[1] As a threshold matter, the Bank asserts that we lack jurisdiction because the district court's order is not "final" within the meaning of 28 U.S.C. § § 158(d) and 1291. We have acknowledged that "questions regarding finality sometimes arise when, as here, a district court reverses a final order of a bankruptcy court but also remands for further proceedings." *N. Slope Borough v. Barstow (In re Bankr.Estate of MarkAir, Inc.),* 308 F.3d 1057, 1060 (9th Cir.2002).

> We resolve such questions of finality through a pragmatic approach; a district court's decision can be considered final for the purpose of appellate review even when a question has been remanded to the bankruptcy court.
>
> If the matters on remand concern primarily factual issues about which there is no dispute, and the appeal concerns a question of law, then the policies of judicial efficiency and finality are best served by our resolving the question now. On the other hand, if the district court remands for further factual findings related to a central issue raised on appeal, the district court's decision is usually not final.

Id. (citations and internal quotation marks omitted).

[2] At first blush, that passage might appear to suggest that we lack jurisdiction. The district court reversed the bankruptcy on a central issue in the case, *viz.*, whether the Jameson Agreement transferred equitable title in the property to Plaintiffs, and remanded the case for further factual findings. But this *appeal* concerns primarily a question of law, and indeed a question of first impression in the Ninth Circuit: When, if ever, are damages for emotional distress recoverable under 11 U.S.C. § 362(h) for a violation of the automatic stay? Our answer will not obviate the need for all further fact-finding, but it *will* materially aid the bankruptcy court in reaching its disposition on remand. *See MarkAir, Inc.*, 308 F.3d at 1060.2 If the bankruptcy court were to find that the foreclosure sale violated the automatic stay, for example, the question of what damages are available would be amplified.

[3] In the circumstances, we conclude that the district court's order is "final" within the meaning of 28 U.S.C. §§ 158(d) and 1291. Accordingly, we have jurisdiction and proceed to the merits.

B. *Claim for Emotional Distress Damages*

[4] Plaintiffs argue that the district court erred in affirming the bankruptcy court's refusal to award damages to George Dawson for emotional distress allegedly arising out of the unlawful detainer action. They rely on 11 U.S.C. § 362(h): "An individual injured by any willful violation of a stay provided by this section shall recover *actual damages,* including costs and attorneys' fees, and, in appropriate

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2 The Bank relies on *Stanley v. Crossland, Crossland, Chambers, MacArthur & Lastreto (In re Lakeshore Vill. Resort, Ltd.),* 81 F.3d 103 (9th Cir.1996). There, we held that we lacked jurisdiction over an appeal from a district court order vacating and remanding a bankruptcy court's order. However, there is no suggestion in *Lakeshore* that a novel question of law, which would affect the disposition of the case on remand, was presented.

circumstances, may recover punitive damages." (Emphasis added.) *See Stinson v. Bi-Rite Supply, Inc. (In re Stinson),* 295 B.R. 109, 119-20 (9th Cir. BAP 2003) (holding that emotional distress damages are available under § 362(h) and following *Aiello v. Providian Fin. Corp.,* 239 F.3d 876, 878 (7th Cir.2001))

[5] To analyze Plaintiffs' position we must determine whether Congress intended the term "actual damages" in § 362(h) to include damages for emotional distress. We begin with the text of the statute, but it does not provide a definition for "actual damages." There is a contextual clue, however, that lends support to Plaintiffs' theoretical position.

[6] Congress chose the term "individual" to describe those who are eligible to claim actual damages under § 362(h). The statute allows any "individual," including a creditor, to recover damages. So, for example, if a willful violation of the automatic stay damages some portion of the bankruptcy estate, both the debtor and an individual creditor of the now less-valuable estate may recover actual damages. *See Johnston Envtl. Corp. v. Knight (In re Goodman),* 991 F.2d 613, 618 (9th Cir.1993) ("Normally pre-petition creditors ... shall recover damages under 11 U.S.C. § 362(h) ... for willful violations of the automatic stay."). But corporations, whether debtors or creditors, are not "individuals" for the purposes of this statute. *See id.* at 618-20 (" '[I]ndividual' means individual, and not a corporation or other artificial entity."); *United States v. Arkison (In re Cascade Roads, Inc.),* 34 F.3d 756, 766 (9th Cir.1994) ("[*C*]*orporate* debtors may not recover sanctions under section 362(h) because the statute refers only to '*individual [s*] ....' "). By limiting the availability of actual damages under § 362(h) to individuals, Congress signaled its special interest in redressing harms that are unique to human beings. One such harm is emotional distress, which can be suffered by individuals but not by organizations.

[7] Even after examining the text and context of § 362(h), however, its meaning remains ambiguous. Recourse to

legislative history is therefore an appropriate tool in determining Congress' intent. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1080 (9th Cir.1999).3

[8] Through the automatic stay, Congress was furthering more than one goal. We have explained that "[t]he purpose of the automatic stay provision is two-fold. By halting all collection efforts, it gives the debtor a breathing spell from his creditors during which the debtor can try to reorganize. By preventing creditors from pursuing, to the detriment of others, their own remedies against the debtors' property the stay protects creditors." *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir.1993) (alteration and internal quotation marks omitted). Under that formulation the stay's "two-fold" purpose, *id.*, is not merely for debtors *and* creditors; the stay also is meant to achieve financial *and* non-financial goals. Plainly one aim of the automatic stay is financial: the stay gives the debtor time to put finances back in order, offers the debtor an opportunity to reorganize so that creditors can be satisfied to the greatest extent possible, and prevents creditors

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3 In our now-withdrawn opinion we relied by analogy on cases holding that "actual damages," under certain federal statutes, do not include damages for emotional distress. *See Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir.2002) (interpreting "actual damages" in the context of the Copyright Act to cover only economic damages); *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (9th Cir.1977) (holding similarly under the Securities Act). Yet we also have held that the term "actual damages" under other federal statutes, does include damages for emotional distress. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1332-33 (9th Cir.1995) (holding that damages for emotional distress were available under the Fair Credit Reporting Act where the plaintiff suffered from sleeplessness, nervousness, frustration, and mental anguish as a result of the statutory violation); *Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir.1982) (holding that "actual damages" under the Equal Credit Opportunity Act may include damages for "mental anguish, humiliation or embarrassment"). Because the question in each instance is what Congress intended in enacting the particular statute at issue, we find little assistance in analogizing to different laws passed at different times and, instead, analyze the Bankruptcy Reform Act of 1978.

from racing to devour the debtor's estate at the expense of fellow creditors. But another purpose is to create a "breathing spell," *id.*, a phrase suggesting a human side to the bankruptcy process.

Our formulation in *Dos Cabezas* faithfully reflects the legislative history which, although it focuses mainly on the financial effects of a violation of the automatic stay, also refers to non-financial harms that may befall a debtor. The House Report for the Bankruptcy Reform Act of 1978 explained:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R.Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97; *see also* S.Rep. No. 95-989, at 54-55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41 (same first paragraph). The House Report went on to say:

> The stay is the first part of bankruptcy relief, for it gives the debtor a respite from the forces that led him to bankruptcy. Frequently, a consumer debtor is severely harassed by his creditors when he falls behind in payments on loans. The harassment takes the form of abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor's reputation, and so on. The automatic stay at the commencement of the case takes the pressure off the debtor.

H.R.Rep. No. 95-595, at 125-26, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086- 87 (footnote omitted). A footnote to that passage directs the reader to an Appendix in which a lawyer for the Federal Trade Commission further detailed abuses to which consumer creditors are frequently subjected:

> When a payment is missed, letters and phone calls commence. Communications are directed at first to the debtor himself ... and then frequently to members of the debtor's family, friends and neighbors, and to the debtor's employer.... Possible use of the wage assignment may be mentioned together with the suggestion that employers don't like deadbeats and tend to discharge employees who generate trouble.

H.R.Rep. No. 95-595, at 169, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6130. The Appendix continued:

> The consumer who seeks the relief of a bankruptcy court is an individual who is in desperate trouble.... The short term future that

> he faces can literally destroy the basic integrity of his household. We believe that this individual is entitled to a focused and compassionate effort on the part of the legal system to alleviate otherwise insurmountable social and economic problems. We believe that relief should be provided with fairness to all concerned but with due regard to the dignity of the consumer as an individual who is in need of help.

H.R.Rep. No. 95-595, at 173, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6134.

[9] Reading the legislative history as a whole, we are convinced that Congress was concerned not only with financial loss, but also--at least in part--with the emotional and psychological toll that a violation of a stay can exact from an 16725 individual. Because Congress meant for the automatic stay to protect more than financial interests, it makes sense to conclude that harm done to those non-financial interests by a violation are cognizable as "actual damages." We conclude, then, that the "actual damages" that may be recovered by an individual who is injured by a willful violation of the automatic stay,4 11 U.S.C. § 362(h), include damages for emotional distress. In so holding, we join an emerging consensus recognizing the availability of damages for emotional distress that results specifically from a willful violation of the automatic stay. *See* McCullough, *Emotional Distress Damages: Should They Be Permitted Under the Bankruptcy Code for a Willful Violation of the Stay?,* 1 DePaul Bus. & Com. L.J. 339 (Spring 2003) (collecting cases and citing *Aiello,*

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4 For the purpose of this appeal there is no dispute that the Bank willfully violated the automatic stay from February 20, 1996, to March 14, 1996. *See Goichman v. Bloom (In re Bloom),* 875 F.2d 224, 227 (9th Cir.1989) (defining "willful violation" of the automatic stay).

239 F.3d 876, and *Fleet Mortgage Group, Inc. v. Kaneb,* 196 F.3d 265 (1st Cir.1999)); Thurmond & Bleming, *Do Section 362(h) "Actual Damages" Include Emotional Distress Damages?,* Norton Bankruptcy Law Adviser No. 9 (Sept.2004) (collecting cases and concluding that a majority of courts "include emotional distress damages in actual damages awarded under § 362(h) only when the debtor meets certain proof requirements," including proof of significant damages and proximate cause).

Because we hold that, under § 362(h), emotional distress damages are cognizable, we turn next to the standard that applies to such a claim. We hold that a claim for emotional distress damages is available if the individual provides clear evidence to establish that significant harm occurred as a result of the violation, a standard on which we will elaborate below. The Seventh Circuit, in *Aiello,* 239 F.3d at 880, required that an individual suffer a *financial* loss in order to claim emotional distress damages.5 It held that emotional distress damages were not compensable on their own because the purpose of the Bankruptcy Code is to protect financial interests and because emotional distress claims are so easily manufactured. *Id.* at 880. We decline to follow that reasoning because we have concluded that the purpose of § 362(h) encompasses more than protection of financial interests and because that statute does not suggest that any one form of damages is dependent on the existence of another form of damages.

[10] Although pecuniary loss is not required in order to claim emotional distress damages, not every willful violation

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5 The majority in *Stinson* relied on our decision in *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.,* 219 F.3d 895, 903 (9th Cir.2000), to support its holding that financial damages must accrue before an individual may assert a claim for emotional distress damages arising from a violation of the automatic stay. *Stinson,* 295 B.R. at 121-22. However, *Pershing Park* applied California state law to an insurance claim and so is inapplicable in the present context.

merits compensation for emotional distress. Like the *Aiello* court, 293 F.3d at 880, we are concerned with limiting frivolous claims. To that end, we hold that, to be entitled to damages for emotional distress under § 362(h), an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process). In so holding, we join a number of other courts that have adopted similar standards.

Fleeting or trivial anxiety or distress does not suffice to support an award; instead, an individual must suffer significant emotional harm. *See, e.g., In re Skeen,* 248 B.R. 312, 319 (Bankr.E.D.Tenn.2000) (holding that " '[b]ecause the emotional distress suffered . . . was fleeting, inconsequential, and medically insignificant, . . . it is not compensable' ") (alteration in original) (quoting *Crispell v. Landmark Bank, (In re Crispell),* 73 B.R. 375, 380 (Bankr.E.D.Mo.1987)).

Consequently, it must be clear that the individual suffered significant emotional harm. An individual may establish emotional distress damages clearly in several different ways.

- Corroborating medical evidence may be offered. *See, e.g., In re Briggs,* 143 B.R. 438, 463 (Bankr.E.D.Mich.1992) (requiring specific and definite evidence to establish an emotional distress claim arising from violation of the automatic stay); *Stinson,* 295 B.R. at 120 n. 8 ("The majority of the courts have denied damages for emotional distress where there is no medical or other hard evidence to show something more than a fleeting or inconsequential injury." (internal quotation marks omitted)); *Diviney v. NationsBank of Tex. (In re Diviney),* 211 B.R. 951, 967 (Bankr.N.D.Okla.1997) (holding that, where emotional distress seemed trivial and no medical evidence corroborated

the claim, damages for emotional distress were not warranted).

- Non-experts, such as family members, friends, or coworkers, may testify to manifestations of mental anguish and clearly establish that significant emotional harm occurred. *See, e.g., Varela v. Ocasio (In re Ocasio),* 272 B.R. 815, 821-22 (1st Cir. BAP 2002) (per curiam) (holding that testimony from the debtor's wife--that he suffered from headaches, did not feel well for a week, and went to the doctor to have his nerves checked—was sufficient to support emotional distress damages of $1,000 without medical testimony).
- In some cases significant emotional distress may be readily apparent even without corroborative evidence. For instance, the violator may have engaged in egregious conduct. *See, e.g., Wagner v. Ivory (In re Wagner),* 74 B.R. 898, 905 (Bankr.E.D.Pa.1987) (awarding emotional distress damages, based on the debtor's testimony, when a creditor entered the debtor's home at night, doused the lights, and pretended to hold a gun to the debtor's head). Or, even if the violation of the automatic stay was not egregious, the circumstances may make it obvious that a reasonable person would suffer significant emotional harm. *See, e.g., United States v. Flynn (In re Flynn),* 185 B.R. 89, 93 (S.D.Ga.1995) (affirming $5,000 award of emotional distress damages, with no mention of corroborating testimony, because "it is clear that appellee suffered emotional harm" when she was forced to cancel her son's birthday party because her checking account had been frozen, even though the stay violation was brief and not egregious).

Our third requirement, that of a nexus between the claimed damages and the violation of the stay, appears in the statute itself. The individual must be "injured by" the violation to be eligible to claim actual damages. 11 U.S.C. § 362(h). *See, e.g., Bishop v. U.S. Bank/Firstar Bank, N.A. (In re Bishop),* 296 B.R. 890, 897 (Bankr.S.D.Ga.2003) (stating that, where emotional distress and willful conduct are established,

the causal link between the violator's acts and the harm must be clearly established or readily apparent).

Having now set the appropriate standards, we apply them to this case. We review for clear error the bankruptcy court's findings of fact, *Batlan,* 265 F.3d at 962-63, and review for abuse of discretion the court's decision whether to award emotional distress damages and, if so, how much to award. *See Smith v. Edwards & Hale, Ltd. (In re Smith),* 317 F.3d 918, 923 (9th Cir.2002) (reviewing for abuse of discretion a bankruptcy court's award of attorney fees); *Renwick v. Bennett (In re Bennett),* 298 F.3d 1059, 1069 (9th Cir.2002) (reviewing for abuse of discretion a bankruptcy court's decision to impose sanctions).

Plaintiff, George Dawson, claimed that he suffered psychological and emotional effects as a result of the Bank's violation of the stay. In refusing to award damages, the bankruptcy court concluded that "there was no corroborating evidence." That finding is not clearly erroneous. George Dawson provided a declaration describing his alleged emotional distress. His wife submitted a declaration describing the emotional distress that *she* allegedly suffered, but she was not a debtor whose damages could be compensable under § 362(h), and she did not give evidence relating to her husband's alleged distress. No other evidence was presented on the issue of emotional distress.

The bankruptcy court also found that the Bank's violation of the stay was not egregious. That finding, likewise, is not clearly erroneous. The violation was brief and minor.

[11] But the bankruptcy court went on to apply the "rule of law suggested by the district court in *Aiello [v. Providian Financial Corp.,* 257 B.R. 245 (N.D.Ill.2000),]" and to hold that corroborating evidence was required because the Bank's violation of the automatic stay was not egregious. As we have explained, an individual can prove entitlement to emotional distress damages even in the absence of corroborating evidence and even in the absence of an egregious violation, if the

individual in fact suffered significant emotional harm and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm. The bankruptcy court did not have the benefit of our opinion and, consequently, failed to consider that possibility. That is, the court applied an incorrect legal standard. The use of an incorrect legal standard is per se an abuse of discretion. *Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.),* 255 F.3d 1061, 1065 (9th Cir.2001). Accordingly, we must reverse and remand for reconsideration.

C. *Rescission*

Plaintiffs next claim that the district court erred in affirming the bankruptcy court's holding that Plaintiffs were responsible for mortgage and tax payments on the Property from February to August of 1996. We disagree.

First, Plaintiffs argue that it is a basic tenet of California real property law that a trustee's sale extinguishes the underlying note and deed of trust. *See Alliance Mortgage Co. v. Rothwell,* 10 Cal.4th 1226, 44 Cal.Rptr.2d 352, 900 P.2d 601, 608 (1995). Plaintiffs reason that, because the February 8, 1996, sale extinguished Defendant's note on the property, they owed no payments thereafter.

[12] Plaintiffs' arguments on this point are unpersuasive. California rescission law empowers a court to undo a transaction and restore the parties to the status quo ante. That is precisely what the bankruptcy court did here--the court *undid* the foreclosure and thereby placed the parties in the positions they occupied before the February foreclosure.

Plaintiffs also argue that, because rescission under California law restores the parties to their status on the early morning hours of February 8, 1996, they owe the Bank no payments for later months in 1996 because no such payments were due on February 8. If that view were correct, and if rescission restored the parties *permanently* to a single moment of the status quo ante, then Plaintiffs would never again owe

any payment on the Property, as there is nothing to limit the logic of Plaintiffs' argument to the period between February and August 1996. It is true that, on February 8, 1996, Plaintiffs did not owe payments for March, April, May, June, July, or August 1996. However, it is equally true that Plaintiffs were, on February 8, parties to a loan agreement that they knew would obligate them to make payments on the Property as each of those months arrived. Plaintiffs seek a windfall (the elimination of the future obligation that existed at the status quo ante) to which they are not entitled.

Second, Plaintiffs argue that the court's ruling is fundamentally unfair. The ruling could have been unfair if Plaintiffs 16731 were obliged to pay penalties for not remitting payment during the months Defendant purported to own the property. The bankruptcy court clearly ruled, however, that Defendant was not entitled to any penalties. The bankruptcy court held that Defendant "is entitled to the mortgage payments that accrued and to reimbursement of any real property tax advances during the period." The district court affirmed that holding, and it did not err in doing so.

[13] We therefore affirm the bankruptcy court's determination that Plaintiffs are responsible for payments accrued between February 8, 1996, and August 8, 1996.

D. *Attorney Fees*

Plaintiffs claimed more than $50,000 in attorney fees. They sought fees in connection with George Dawson's Chapter 7 case and also in connection with the present case.

On the Chapter 7 claim, the bankruptcy court held that Plaintiffs were entitled to fees generated in obtaining dismissal of the unlawful detainer action. The court held that only an hour of attorney time was required to remedy the stay violation and awarded Plaintiffs $200. Plaintiffs did not appeal this portion of the fee award.

With respect to the present case, the bankruptcy court ruled that Plaintiffs were entitled to *some* fees because they had established a single item of damages: the $200 award.

However, the court found Plaintiffs' request to be "grossly disproportionate to the cost of litigating the issue in question." Observing that Plaintiffs prevailed on only 1 of 20 issues, the court awarded one-twentieth of Plaintiffs' costs and fees in litigating the action. The bankruptcy court also held that the hourly rate actually charged by Plaintiffs' counsel represented the reasonable value of his services. The court therefore divided the total fees and costs incurred in the action ($42,152.12) by 20, arriving at the sum of $2,107.60. Adding in the $200 from the Chapter 7 case, the total award was $2,307.60.

The district court held that the bankruptcy court did not abuse its discretion in determining the amount of attorney fees and costs to which Plaintiffs were entitled. The district court further held that if, on remand, the bankruptcy court finds that the Bank's foreclosure sale violated the automatic stay, the bankruptcy court will have to decide whether Plaintiffs are entitled to a larger award of fees.

On appeal to us, Plaintiffs argue that the bankruptcy court erred in calculating both the time that counsel reasonably expended and the hourly rate. We are not convinced by Plaintiffs' arguments.

As to the time expended, Plaintiffs' counsel gave only a rough estimate of what proportion of the total time in the case related to the single successful issue. That estimate was not corroborated and the bankruptcy court was entitled to find that the estimate substantially overstated the hours reasonably expended on the unlawful detainer issue. "Substantively, both the Supreme Court and our cases have emphasized the discretionary nature of the court's determination of the number of hours *reasonably* expended." *Cunningham v. County of L.A.*, 879 F.2d 481, 484 (9th Cir.1988). *Cunningham* also explains that inadequate documentation is a factor the court properly may consider in assessing the appropriate number of hours. Additionally, even where evidence supports a particular number of hours worked, the court may give credit for fewer

hours if the time claimed is "excessive, redundant, or otherwise unnecessary." *Id.* at 484 (internal quotation marks omitted). The court did not abuse its discretion in determining that the reasonable amount of time spent on the unlawful detainer issue represented five percent of counsel's total time.

With respect to the hourly rate, the bankruptcy court did not assume that the charged rate was the appropriate lodestar rate *only* because it was the rate actually harged. *Cf. Cedic Dev. Co. v. Warnicke (In re Cedic Dev. Co.),* 219 F.3d 1115, 1117 (9th Cir.2000) (reversing a fee determination when the rates actually charged "were bargain rates"). Rather, the bankruptcy court considered the quality and efficiency of counsel's services. The court's conclusion that $200 per hour was a reasonable rate is not an abuse of discretion.

[14] In short, the bankruptcy court and district court permissibly calculated fees and costs. As the district court noted, a recalculation may be required as a result of the remand to the bankruptcy court, but no error in the award of fees and costs appears to date.

AFFIRMED in part; REVERSED and REMANDED in part. The parties shall bear their own costs on appeal.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATED COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re GEORGE E. DAWSON and BARBARA J. DAWSON,

Debtors.

/

GEORGE DAWSON and BARBARA J. DAWSON,

Plaintiffs-Appellantes,

v.

WASHINGTON MUTUAL BANK,F.A., successor to Great Western Bank,

Defendant-Appellee.

/

No. 02-16903

D.C. No. CV-01-02367-CW

[Filed February 28, 2005, U.S. Court of Appeals]

Before: HALL and GRABER, Circuit Judges, and WEINER,* Senior Judge.

The panel has voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en

* The Honorable Charles R. Weiner, Senior District Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

banc, and Judges Hall ad Weiner have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.